



## CJEU ruling on in-transit goods sheds some light on detainment conundrum

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The Court of Justice of the EU has ruled that shipments coming from a non-EU country that are in customs warehousing or in transit in the EU can only be classified as "counterfeit" or "pirated" – and detained under the anti-piracy legislation – if it is proven that they are intended for sale in the EU.



Though the joined cases in the December 1 decision involved electronic products, the ruling may have implications for the pharma industry, particularly in light of the controversy over [Indian generics](#) en route to the developing world that were seized by customs officials in Member States including the Netherlands and France.

In *Philips/Lucheng* (C-446/09) and *Nokia/HMRC* (C-495/09), the court also concluded that goods coming from a non-EU country that are imitations of goods protected in the EU by certain intellectual property rights cannot be considered counterfeit or pirated within the meaning of the anti-piracy legislation (Council Regulation 1383/2003) merely on the basis of the fact that they are brought into the customs territory of the EU without being marketed or sold there.

According to attorneys at the Dutch office of international law firm De Brauw Blackstone Westbroek, this effectively dismisses the Dutch Supreme Court's view that the application of the anti-piracy regulation should be based on a "manufacturing fiction" for in-transit goods. In other words, under the Dutch interpretation, in-transit goods are assumed to be produced in the Netherlands for the purpose of establishing IP infringement.

The CJEU, however, says that customs authorities may temporarily detain in-transit goods when there are indications that the goods are about to be marketed to EU consumers, for example, if their destination is not declared, if there is no precise or reliable information as to the identity or address of the manufacturer or consignor, if there is a lack of co-operation with the customs authorities, or if officials discover documents or correspondence that suggest a likely diversion of the goods to EU consumers.

Though the decision goes some way towards clarifying when in-transit shipments of goods may be detained by the customs authorities of Member States in view of trade mark and other IP rights, the attorneys say that it is still unclear as to whether the court's interpretation of the law applies to patent rights.

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