

Ministry of Finance

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HAI Europe
Attn: Ms S. Bloemen
Overtoom 60/II
1054 HK Amsterdam
The Netherlands

Directorate-General for the Tax and
Customs Administration
Legal Affairs Team

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Our Reference
DGB/2009/2059 U

Your letter (reference)
3 April 2009

Annexes
1

Date: 7 May 2009

Re: Wob request for information about action by Customs concerning medicines in transit

Dear Ms Bloemen,

In a letter dated 3 April 2009, you submitted a request under the Wet openbaarheid van bestuur [Government Information (Public Access) Act] (hereinafter: 'Wob') for documents regarding action by Customs concerning medicines in transit. Your Wob request consists of four parts:

1. General requests by the companies/patent owners/representatives to give notification of, hold back or limit cargo containing medicines passing through Dutch Customs;
2. The notifications by Customs to patent owners or their representatives with respect to cargo containing medicines in transit;
3. Further communications between Customs and the patent owner, 'third parties' and/or commercial organisations regarding this subject;
4. Overviews of detentions of medicines in transit in the Netherlands.

Assessment of the parts of your request

I will respectively assess the aforementioned parts as to possible disclosure in anonymous form.

Part 1: General requests for notification

These requests are based on Article 5 of EC Regulation No. 1383/2003 of 22 July 2003. Under this Article, receiving and recording such requests are part of Customs' duties. In Customs matters, information furnished confidentially by market parties are subject to the confidentiality obligation in Article 15 of the Community Customs Code (hereinafter:

'CCC'), unless expressly provided for otherwise. Article 9 of EC Regulation No. 1383/2003 is one such exception. It expressly indicates that, in certain specific situations, the trademark owner will be informed. Notification is thus only given to interested parties. The Wob pertains to disclosure to anyone, and is therefore entirely different in nature. Accordingly, I will not allow disclosure of these requests. For this reason, too, I will not review the exceptions under the Wob as these may relate to the refusal to disclose information which is not anonymous in form.

Alternatively, I rely on the relative exceptions set forth in Article 10.2, opening lines and sub paragraphs (d) and (g), Wob. I invoke the exception in Article 10.2, opening lines and sub-paragraph (d), Wob, to wit, the interest of inspection, checks and supervision, because checks will be impeded if such requests must be disclosed. If it is known for which trademark such a request has been made, potential trademark right infringers may modify their conduct. In this connection, the interest mentioned in the exception under Article 10.2, opening lines and sub-paragraph (g), Wob, to wit, avoiding disproportionate favouring or harming of the parties concerned or third parties, applies to the trademark owners. If the checks by Customs are less effective, this will directly affect the trademark owners' interest.

In addition, the trademark owner must be able to freely balance its interests in making or not making such requests based on the aforementioned Regulation, without this being disclosed publicly. These requests are thus stated to Customs confidentially, that is, subject to the aforementioned confidentiality obligation. In this regard as well, I invoke the exception in Article 10.2, opening lines and sub paragraph (g), Wob. The interests of the trademark right holders would be disproportionately affected if these requests had to be made public.

An overview has been drawn up of these requests by right holders. This overview cannot be furnished, either, as this overview contains information permitting the holders to be identified. The list consists solely of file numbers, names of trademark owners and trademarks. The last piece of information would result in identification of the trademark owner. I can state, though, that there are currently 48 outstanding requests, and one or more (sometimes dozens of) medicines are listed for each request. I will deny your Wob request as to this part in all other respects.

Parts 2 and 4: The notifications by Customs and overviews of detentions of medicines in transit in the Netherlands

Disclosure under the Wob relates to information recorded in documents. If there are no documents, there is in principle no right to the information, either. An administrative body is not required to draw up such documents. I therefore examined which documents were available which fulfil your request.

In connection with the confidentiality obligation in Article 15, CCC, mentioned earlier, the files regarding the notifications cannot be disclosed. Here, too, I alternatively rely on the relative exceptions in Article 10.2, opening lines and sub-paragraphs (d) and (g), Wob. I refer you to what I said about this regarding Part 1. I also rely on the absolute exception in Article 10.1, opening lines and sub-paragraph (c), Wob. This exception provides that information concerning business and manufacturing data which has been stated to the government confidentially should not be furnished. These files may reveal competitively sensitive information. I will therefore not allow the files to be disclosed.

An overview of the detentions for the year 2008 pertaining to the medicines in transit has been drawn up as well. This likewise includes the notifications. The list also contains information from which various market parties may be identified. Moreover, disclosure of the other data will lead to parties being identified, so that the list cannot effectively be produced in anonymous form. I can, however, provide you with a summary of the list. This is enclosed as Annex 1. I note that the list reflects the situation as of the end of 2008. Later developments have not been incorporated into this list.

Part 3: Further communications between Customs and the patent owner, 'third parties' and/or commercial organisations regarding this subject

This part of your request is formulated so broadly that it is impossible to indicate the specific documents to which it relates. There is an entire department working at Customs which handles such requests. Consequently, this part is so broad in scope that it is not possible to reasonably process this as a request for specific documents. If you have a particular matter in mind, please indicate this specifically.

Order

Given the foregoing, I deny in part your request for disclosure.

For your information, I point out that you may file a notice of objection to this order under Section 6.2 of the General Administrative Law Act within six weeks of the date of this order. The notice of objection should be filed with the State Secretary for Finance, Room KV 2.52, P.O. Box 20201, 2500 EE The Hague. The notice of objection must be signed by the party filing it and contain at least the party's name and address, the date, a description of the order objected to and the grounds for the objection.

Yours sincerely,
THE STATE SECRETARY FOR FINANCE,
on the State Secretary's behalf,

[SIGNATURE]

J. van der Vlist
Management Team Member, Tax and Customs Administration

Annex 1 to DGB 2009-02059

Summary of the overview of detentions of medicines in transit for the year 2008

This overview indicates the situation as of 31 December 2008.

Origin

There were 17 shipments detained within the meaning of Directive 1383/2003. Of these, 16 came from India and 1 from China.

Destination

5 x Peru
4 x Colombia
2 x Ecuador
2 x Mexico
1 x Portugal
1 x Spain
1 x Brazil
1 x Nigeria

Type

The following types of goods were involved:

8 x cardiologic medicines (in total, 100,000 pills and 1850 kg)
5 x lifestyle medicines (in total, 400 kg)
2 x AIDS inhibitors (in total, 30,000 pills and 24 kg)
1 x medicines against dementia (94,000 pills)
1 x medicines against schizophrenia (500,000 pills)

Action

6 Presumed authorisation
4 No action
2 Waiver
1 Prejudgment attachment
1 Settlement
1 Pending
1 Summons by the trademark owner
1 No response by the trademark owner