CLECAT
European Association for Forwarding, Transport, Logistics and Customs Services

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POSITION PAPER

IPR Toolbox for Transport & Logistics

CLECAT, the European Association for freight forwarding, transport-, logistics- and customs services is supportive of the Commission's intention to set up an EU toolbox to step up the fight against counterfeiting. CLECAT represents the interests of more than 19.000 companies employing in excess of 1.000.000 staff in logistics, freight forwarding and customs services. Multinational, medium and small freight forwarders and Customs agents are all within its membership, making the organisation the most representative of its kind.

The EU toolbox is proposed within the ambit of the Commission's Action Plan on Intellectual Property to strengthen EU's economic resilience and recovery, and aims to enhance joint action, cooperation and information sharing among right holders, *intermediaries* and law enforcement authorities, as well as promote the use of new technologies. According to the Commission, transport and logistics service providers are among the key intermediaries to help fight counterfeiting. The toolbox should clarify the roles and responsibilities, as well as identify ways for the parties to cooperate, focusing fundamentally on the sharing of relevant data on products and trades. This paper sets out the views, concerns and recommendations of the European freight forwarding, transport and logistics industry on the EU Toolbox against counterfeiting.

Executive Summary:

- CLECAT is ready to continue to support the upholding of IP-rightsholders' rights, provided rules are proportionate, consider market reality and do not impose undue burdens on the industry.

- Logistics Service Providers (LSPs) handle hundreds of thousands of consignments daily for and behalf of their clients, the shippers. LSPs are only in exceptional situations allowed to open consignments or pallets on which goods are stored or packed for transport.

- It is important to consider the different types of service providers on the market, as LSPs cannot be considered as intermediaries in the same way as online platforms or trade intermediaries.

- Case law at national and EU-level shows that the services of an intermediary in relation to branded goods owned by a third party, i.e. the IP right holder, do not qualify as "use of the trademark in the course of trade". Thus, the intermediary cannot be held responsible for an infringement of IP rights in that regard.

- Physical controls of the goods to detect counterfeits must stay with national or EU authorities. It would be disproportionate to task LSPs to make informed, legally binding judgments on the authenticity of inspected goods, even for staff which is trained and employed to check goods for IPR infringements.

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- Whilst LSPs are supportive of due diligence by inspecting suspicious consignments, it is unreasonable, disproportionate, and impossible to oblige LSPs to proactively investigate, exchange information, supervise and implement systems for the detection of IPR infringements

Creating an EU Toolbox against counterfeiting

The European Commission's Action Plan on Intellectual Property to strengthen EU's economic resilience and recovery aims at reinforcing cooperation between all involved players, including right holders, suppliers, various intermediaries (e.g. online platforms, social media, the advertising industry, payment services, domain name registrars/registries, and transport and logistic companies), as well as public enforcement authorities to curb privacy.

As part of its Action Plan, the Commission is bringing forward the creation of an EU Toolbox against counterfeiting. CLECAT welcomes the fact that the toolbox will be based on reported practices and principles developed in the context of various industry-led initiatives. Examples given are the recently published reports on the functioning of the Memorandum of Understanding on the sale of counterfeit goods on the internet and the Memorandum of Understanding on online advertising and IPR. These reports however all relate to intermediaries that operate digitally, including online platforms and digital advertising agencies. The reports refer to, *inter alia,* practices of online platforms to provide actively information to IPR owners and to adopt notices-and-take down procedures, as well as to 'pro-active and preventive measures', including automated technical measures to actively monitor use of their platform for IPR infringements. As this relates to a digital environment, the impact of new legislation on the tasks and responsibilities of logistic services providers is unclear. Therefore, CLECAT supports the upholding of IP-rightsholders' rights, provided the rules are proportionate, consider market reality and do not impose undue burdens on the industry.

State of Play

In today's business environment, freight forwarders and logistics service providers (LSPs) are often confronted with claims for damages launched by IP-rightsholders regarding IPR infringements that are committed by the LSPs' clients, the shippers. CLECAT firmly believes that LSPs cannot be held **responsible and liable for these IPR infringements, as these infringements are beyond their control**. LSP's cannot be considered as guardian of IP rights as they are not trade or online intermediaries or data resource facilities. Case law at national level throughout various EU Member States, as well as the Court of Justice of the European Union (CJEU) confirms this position (see here).

Nonetheless, LSPs can apply several mechanisms in support of the protection of IP rights (see here). CLECAT is willing to support the European Commission, together with other stakeholders, on addressing this important issue, without imposing undue burdens on the transport and logistics industry.

The below sets out the role and position of LSPs in the logistics supply chain, demonstrating why LSPs cannot, and thus should not, be held liable for IPR infringements.

Role and Position of Logistics Service Providers in the Supply Chain

A freight forwarder is a logistics service provider (LSP) who is contracted by a party, the shipper, to arrange the transport of goods from A to B in the most suitable manner, by concluding contracts with carriers supported by business knowledge and skills. Additionally, the freight forwarder provides one or multiple additional logistics services during that journey, including, *inter alia*, customs formalities and clearance, security requirements (e.g. screening and securing goods), (un)loading, storage, stock management, assembly, order handling, order picking, preparation for shipping, invoicing, information exchange and management. **All of those services are provided for and on behalf of the client**, i.e. the shipper, **exclusively upon the client's request**. Thus, the LSP provides services for and on behalf of his client, subject to the conditions specified in the contract that has been concluded between the parties. As such, the **LSP is not himself involved in the actual sales transaction between the seller and buyer**, and thus only has access to the information and instructions related to the goods which he has received by his client.

As part of their operations, **LSPs handle hundreds of thousands of consignments daily for shippers who expect fast and flexible services** for the **speedy, safe and reliant transport of their goods**. Due to this, goods entering a warehouse or distribution centre are often directly sorted for the next destination after unloading. If (temporary) storage is required, this is done in a warehouse, which typically is very large, consisting of many isles with stored goods, each stacking up to 15 metres in hight. As a result, hundreds of thousands of goods can be stored by LSPs in their warehouses.

Generally, a **LSP takes over a consignment from the shipper which is sealed** (with security tape) and **checks it for signs of tampering**. If the consignment shows no such signs, the handling process can continue. If signs of tampering are detected, such as holes in the packaging or broken seals, or if any other indications exist raising suspicion, action will be taken by the LSP (see here).

Additionally, it has to be noted that **generally LSPs are not allowed to open consignments or pallets on which goods are stored or packed for transport**, as they do have the obligation to deliver the goods in the same condition as they were received. Derogations from this rule may take place if:

- the LSP agreed with his client that e.g. for auditing or inbound quality inspections consignments may be opened, or that additional services relating to the goods have to be performed which require the opening of the consignment;
- the opening of the consignment is necessary for security reasons;
- the LSP receives an official request by the authorities (i.e. customs) to open the consignment.

Above elements need to be considered when seeking to attribute monitoring tasks to LSPs. Whilst LSPs agree that IP-rights, such as trademarks, must be protected, it is not the role of the LSP to be the 'guardian' of IP rights and to actively trace any possible infringements. Imposing such requirements on LSPs are unreasonable as it does not lie within their responsibility. Active monitoring and tracing of any possible IP right infringement would require LSPs to open and inspect every consignment. Such a **process would be extremely time-consuming and disrupt the work of the LSP**, as described above.

Additionally, it would **require the hiring of staff qualified to detect trademark infringements**, which does not belong to the expertise of any LSP. Moreover, such infringements of IP-rights might not always be visible; IPR infringements in the pharma industry can be very hard, if not impossible, to detect at mere inspection. Here a distinction can be made between the unlicensed use of a company's

branding for a medicinal product that is genuine, as well as the unlicensed use of a company's branding for a medicinal product that does not contain the right substance, making it not only a counterfeit infringing a trademark, but also a dangerous substance for society. Lastly, trademark infringements can also occur when a genuine product is sold on a market for which it has not been authorised. All situations described above represent an infringement of IP-rights, however, the possibility to detect those differs greatly. Whilst obvious counterfeits might be recognisable (e.g. due to spelling errors in the brand's name), others might be impossible to detect without an intrusive analysis.

In view of the above, it is **unreasonable to require LSPs to carry out activities which they are unable to perform**. Even if trained staff is employed to specifically check the goods for IPR infringements, it would be **disproportionate to task LSPs to make an informed, legally binding judgment on the authenticity of the inspected goods**. This inability to inspect or decide upon the legitimacy of the goods makes it **impossible to attach any IPR related liability to LSPs, as they have no way, practically or legally, of assessing the risk**.

Ultimately, the protection of IP rights, including trademarks, cannot lead to the imposition of disproportionate burdens, significant delays in the process and excessive costs for LSPs, who provide services for and on behalf of their clients. Whilst LSPs can continue their current practice of due diligence and investigate suspicious consignment, it is unreasonable, disproportionate, and impossible in practice to oblige LSPs to proactively research / investigate, exchange information, supervise and implement systems for the detection of IPR infringements

When acting on behalf of their clients, LSPs are often required to provide Customs with relevant information for risk assessment, which is performed by Customs itself and may entail action decided upon by Customs or other another competent authority. In that regard, LSPs may be requested to execute Customs decisions, however, they cannot take them in lieu of Customs.

Role of other parties in the Supply Chain

The responsibility to ensure that no IP rights are infringed should be primarily the responsibility of the party who instructs for the transport of the goods (i.e. the shipper).

Generally, **physical controls of the goods to detect counterfeits must stay with national or EU authorities**, as it is (nearly) impossible and disproportionate to require the employees of a LSP to detect an infringement of IP rights, including counterfeiting, due to the reasons described above. Such a type of control cannot be considered as part of the obligations of a commercial business, but instead must remain with the appropriate authorities.

Establishing the legitimacy of the underlying sale forms part of the work of trained Customs staff, who are working within the framework of established procedural rules and standards, or alternatively the right holders themselves, with whom the burden of proof for counterfeit goods lays.[1] This is particularly relevant as, in many cases, it is only the right-holder who can actually confirm the illegitimacy of the goods.

[1] Relevant legislation includes, *inter alia*, Council Regulation (EC) No 1383/2003 and Commission Regulation (EC) No 1891/2004; cf. also the decision in the case of Her Majesty's Revenue and Customs (HMRC) v Penbrook Enterprises Ltd [2008] NIMag2 in applying EU law

Intermediaries – can LSPs be considered as such?

In its Action Plan, the Commission includes transport and logistics companies as intermediaries. However, **CLECAT opposes the inclusion of LSPs as intermediaries in the same way as online platforms and trade intermediaries**. There are inherent differences in the setup and functioning between LSPs, online platforms and trade intermediaries, which mean that they cannot be addressed in the same manner, and thus a differentiation has to be made.

Contrary to an online platform, the **LSP does neither have any say in the products concerned, nor any knowledge of their characteristics other than those communicated for transport purposes (e.g. nature of the goods, handling instructions for dangerous goods, etc.)**, as he is merely tasked with arranging the transport of the goods and potentially ancillary services related to the goods' transport. Instead, the **LSP is completely dependent on its client for information and instructions regarding the goods**. **The LSP is not a party in the chain of sale of the goods, nor does he directly or indirectly market the goods**. Therefore, the LSP cannot be fully aware of the trade history of the goods at issue. Furthermore, the LSP never takes decisions pertaining to the commercial transaction between seller and buyer. The seller and/or buyer give instructions to the LSP, which then will be performed by the latter. Therefore, the LSP cannot be considered the same as a trade or online intermediary.

This view is supported by case law at national and EU-level. For example, already in 1982, the Benelux Court of Justice in its judgment in the *Hagens/Niemeyer*[2] case held that where a carrier has no other involvement with the goods than taking delivery of the goods from the sender, transporting them and delivering them to the addressee, **such acts do not constitute trademark use and the carrier cannot be held liable for any infringements of IP rights** (in this case, a trademark infringement).

According to the Benelux Court of Justice, to establish 'trademark use', the trademarked sign must be used by the carrier in any event to promote the sale of its transport services. This is not the case if the carrier only transports branded goods incidentally by order of another party (i.e. the shipper), while the fact that the goods are traded under a (specific) brand has no value or meaning whatsoever for the services of the carrier. Thus, **the mere use of the trademark in the general economic traffic is not sufficient to establish trademark-relevant use**. It has been confirmed in literature that the doctrine of the judgment is still valid, despite the fact that it was delivered before European harmonisation.

Thus, **if a service provider only performs services on behalf of others with regard to branded goods, whereby it cannot be said that these branded goods have a different meaning for the service provider than other unbranded goods, a service provider does not use the trademark**. In that case the service provider is not considered an 'economic operator' under these circumstances and cannot be held liable for an infringement of IP rights. This would be different if the service provider explicitly indicates externally that he performs services in relation to the branded goods (for example by stating this on the truck).

With a reference to Hagens/Niemeyer, the Court of Appeal of 's Hertogenbosch (Netherlands) held in 2009 in the Bacardi/Loendersloot[3] case that the Loendersloot operating companies, with the storage and transport of allegedly infringing Bacardi products owned by a third party, did not use Bacardi's trademarks and thus did not infringe them.

[2] Benelux-Gerechtshof 29 juni 1982, NJ 1982/624 (Hagens/Niemeyer)
[3] Hof Den Haag 27 December 2016, IEF 16512 (Bacardi/Top Logistics)

At EU-level, in line with the above, in 2010 and 2011, the Court of Justice of the European Union (CJEU) ruled in *Google France*[4] and *Winters v Redbull*[5] that **the services of an intermediary in relation to branded goods owned by another do not qualify as "use of the trademark in the course of trade**" within the meaning of Article 10 of the Trade Mark Directive (Directive (EU) 2015/2436). The same rationale was applied to online intermediaries in the *l'Oréal/eBay* case[6] with respect to eBay, a marketplace operator, allowing its users to display their sales offers on the eBay website, which might be potentially infringing IP rights. In that instance, the CJEU held that whilst the trademarks are 'used' on the eBay website, it does not necessarily follow that eBay uses the trademarks, as there is no use in its own commercial communication. As such, eBay only provides a service consisting in enabling its users to display products, potentially containing third party trademarks on eBay's website in the course of their business.

As can be deducted from the above, the **case law at EU and national level qualifies the services of any intermediary**, both physical intermediaries (such as the carrier) and online intermediaries (such as the operator of an electronic marketplace), **as irrelevant for the trademark**. The case law that relates to online intermediaries can be applied by analogy to the services of a LSP as far as this point is concerned. This is demonstrated by the CJEU's 2015 judgment passed in the case of *Top Logistics v Bacard*i[7]. In referring to *Winters v Redbull*, the CJEU held that the **service provided by the customs agent in respect of temporary storage of branded goods**, regardless of whether those goods have been placed under a duty suspension arrangement, **is not infringing IP rights.**

It has to be noted at this point that the CJEU in *Top Logistics v Bacardi* was unable to rule on Top Logistics' activities as a freight forwarder (e.g. providing customs formalities services for imports and exports) because this activity did not constitute an element of the preliminary question submitted to the CJEU. However, it **clearly follows from the precedent set in *Hagens/Niemeyer, Google France, Winters Redbull and l'Oréal/eBay* that the same rationale applies**. Thus, the same conclusion would have been reached by the CJEU in Top Logistics/Bacardi to the activities carried out by a LSP. This would include the performance of customs formalities, for import and export, paying excise duties and filing excise declarations, as well as preparing transport documents.

Most recently, the same rationale was confirmed in the *Coty Germany/Amazon* case[8], which concerned the question of the trademark qualification of the acts of an intermediary where Amazon provided temporary storage of infringing goods owned by another.

Taking into account the case law from the Benelux Court of Justice, the Dutch courts, as well as the CJEU, it **clearly follows that the services of a pure intermediary with regard to goods of third parties**, by means of which it becomes possible for these third parties to use the trademark of another party, **do not meet the criteria** of Article 9 (2) of the EU Trademark Regulation, and respectively 10 (2) of the Trade Mark Directive ('use of the sign for goods/services'). Thus, **these actions cannot qualify for IPR infringements, as the action by the intermediary** (i.e. the transport of the goods and ancillary services) **does not create a link between the use of the trademark and the services of the intermediary**.

[4] Cases C-236/08 - C-238/08 (Google France)
[5] Case C-119/10 (Winters/Redbull)
[6] Case C-324/09 (l'Oréal/eBay)
[7] Case C-379/14 (Top Logistics/Bacardi)
[8] Case C-567/18 (Coty Germany/Amazon)

In the digital environment, certain obligations have been imposed on digital service providers in recent years, e.g. for e-Commerce platforms, to counter IPR infringements, e.g. automatic filtering systems and digital notice-and-take down procedures (cf. Case C-682/18, (*YouTube & Cyando*)).

However, unlike an online intermediary, the **LSP does not have the ability to implement an automatic filtering system**. This is due to the fact that the ICT systems of logistic services providers (e.g. the Transport Management System (TMS)) are set to determine the quickest connections to get the goods from A to B, to be able to follow the goods during transport (track and trace), and to communicate with their clients, carriers, Customs authorities (in order to file declarations), etc. Thus, these ICT systems are not concentrated on the goods themselves, but instead on their route and the ancillary services offered.

Furthermore, so called 'notice-and-take-down-procedures' are not feasible or (very) expensive for LSPs who operate on a large scale. For example, as noted above, LSPs handle hundreds of thousand units (under customs status T1 or T2) on a daily basis. Requiring a LSP to check each individual product and to remain in close collaboration with trademark owners, will be burdensome and time-consuming, thus leading to delays and ultimately disruptions in the supply chain. If such a provision would be included nonetheless, the financial implications will have to be addressed, too. Since trademark owners are the only ones directly and financially benefiting from this investment, it would follow logically that they should compensate LSPs for such investments. However, trademark owners are generally not the clients of the LSPs, thus it will be difficult to recuperate the costs for such a service.

CLECAT therefore underlines that a differentiation must be made between the different types of service providers on the market, as LSPs cannot be considered as intermediaries, based on the observations above.

Data Collection and Sharing – Is this feasible for LSPs?

Considering possible requirements to collect and share data, it must be noted that the LSP has a certain set of data at his disposition that was provided by his client, which is shared with authorities, e.g. Customs. The **LSP is fully dependent on his client for information and instruction regarding the goods**. Other than for Customs declaration purposes, this information will often be provided in a generic format, with no reference to the actual IPR owner being made. Thus, **LSPs will only have nominal information on the company, the type of goods and its destination**. It must also be noted that LSPs often have **non-disclosure agreements** enshrined in the contracts with their clients. Additionally, even if more data is available for the purpose of the customs declaration, the above-stated arguments remain valid.

Whilst the data available to LSPs could be used to a certain extent to help trace trademark infringements, it would be **disproportionate to require LSPs to introduce dedicated ICT solutions for the collection of data to trace IPR infringements**, as it would represent a significant administrative and monetary burden, which cannot be recuperated from the LSPs client (i.e. the shipper), as he is not the party benefitting from such a system.

Best Practices

In their daily operations, **LSPs are required to, and do, inspect the consignments received as part of the handover process**. Consignments are checked for signs of tampering on the consignment itself,

i.e. ensuring that the consignments do not show any signs of tampering when they are taken over. This includes the checking of the consignments' state (i.e. no holes in the packaging) and the intactness of existing seals. These handover processes must be carried out correctly by LSPs at all times.

In case of suspicion, LSPs **take action, by notifying authorities and providing any necessary support required by Customs to facilitate the checking** of the consignment to ensure that this does not violate IP-rights.

CLECAT believes that existing legislative frameworks at EU- and global level already provide sufficient regulation for LSPs, which should also be sufficient to satisfy the requirements of IP rightsholders regarding the responsibility of the LSP in the process. These include *inter alia:*

International and EU legislative framework for the protection of IPR

The **WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)** represents the most comprehensive multilateral agreement on intellectual property and plays a central role in 'facilitating trade in knowledge and creativity, in resolving trade disputes over IP, and in assuring WTO members the latitude to achieve their domestic policy objectives'. The TRIPS represents a legal recognition of the significance of links existing between Intellectual Property and trade, as well as the need for a balanced IP system.

As such, the **TRIPS gives rights holders the ability to apply for the service of Customs in tracking down and holding specific shipments of products that they think may infringe their copyright**. The same mechanism can be found in EU legislation[9] under which a right-holder can register the intellectual property he holds over a specific product. Thus, **IP right holders can defend their legitimate interest connected to an IPR infringement by requesting Customs enforcement actions at the border in case of suspicion**.

Under existing legislation, IP right holders pay for the service rendered of storage or destruction of goods which infringe IP rights. As such, it follows logically that should the LSP, who receives no benefit from the detention, destruction, or storage of those goods, be required to take such action, he should not have to bear the cost for this, as there is no connection between the LSP and the infringement of the IP rights.

Requirements concerning security and customs

Under EU Customs legislation, based on the Union Customs Code (UCC), **LSPs need to provide certain data to Customs for the purposes of the customs declaration.** Customs action at the external border plays an essential role in protecting citizens and the EU internal market against safety and security threats, and also covers the protection of IP rights.

The mandatory provision of advance cargo information and subsequent risk analysis will enable early identification of threats and help customs authorities in the EU-27 Member States to intervene at the most appropriate place in supply chain. For customs purposes, security and safety risks cover a range of issues including, *inter alia,* explosives in air cargo ('bomb in the box'), narcotics, precursors,

[9] Regulation (EU) No 608/2013 concerning customs enforcement of intellectual property rights and repealing Council Regulation (EC) No 1383/2003

dangerous fake medicines, dangerous toys or electronics, contaminated foods, weapons, and all types of organised smuggling.

Following the introduction of the Import Controls System 2.0 (ICS2), which is currently being rolled out for all modes of transport in three releases between 2021 and 2024, certain **data elements required for the Entry Summary Declaration (ENS), i.e. the information to customs authorities about goods being brought into the EU customs territory, in particular the Pre-Loading Advance Cargo Information (PLACI) data elements (a mandatory minimum dataset of the ENS declaration), will have to be lodged at the pre-loading stage**.

Trusted trader programmes, such as AEO for security and customs

The **Authorised Economic Operator (AEO)** is a trusted-trader concept, based on the Customs-to-Business partnership introduced by the World Customs Organization (WCO). As part of that, traders who voluntarily meet a range of criteria work in close cooperation with customs authorities to ensure the common objective of supply chain security and the facilitation of legitimate trade. **To become AEO, companies need to prove, based on their processes, that they are a trusted trader. In return for that, the economic operators are entitled to enjoy certain benefits.** The programme is open to all supply chain actors and covers economic operators authorised for customs simplification (AEOC), security and safety (AEOS) or a combination of the two. LSPs belong to those operators who make extensive use of the AEO concept.

The EU AEO concept, which is based on the internationally recognised WCO standards, is a partnership programme between the customs authority and the economic operator, implying that there must always be a relationship between customs and the applicant/AEO. This relationship must be based on the principles of **mutual transparency, correctness, fairness and responsibility**. LSPs in the EU make extensive use of the AEO concept, making them trusted traders who can therefore benefit from the available customs simplifications.

Considering the existing acquis of IPR protection under international and EU legislation, as well as the requirements imposed by Customs on LSPs, both by default and those linked to a trusted-trader status, it becomes apparent that there is vast direct and indirect protection for IP rights and related requirements imposed on LSPs. The **underlying question here is thus why a company (i.e. the trademark owner) would be entitled to impose more requirements on a LSP to protect his IP rights than a Customs authority requires** from an economic operator to grant him procedural simplifications.

Suggestions for an EU Toolbox

According to the Commission's action plan, the Toolbox will be based, *inter alia*, on reported practices and principles developed in the context of various industry-led initiatives. CLECAT welcomes the fact that existing practices should be codified and stresses the importance of ensuring a constructive dialogue between all stakeholders in the supply chain when agreeing on a set of principles. In that regard, above-mentioned processes carried out by LSPs at handover of the goods, as well as the existing legislation surrounding Customs formalities and IPR protection should be taken into account.

The protection of IP rights, such as trademarks, is important, however, it should in no way lead to a disproportionate burden, high costs and delays for LSPs. As stated above, a **LSP is acting solely for and**

on behalf of the client, i.e. the shipper, and exclusively upon the client's request. As such, the LSP is not himself involved in the actual sales transaction between the seller and buyer, and thus only has access to the information and instructions related to the goods which he has received by his client.

To appropriately address the problem of counterfeiting whilst taking into account the above-mentioned views and concerns, CLECAT would suggest the **creation of a guidance document containing best practices**, as outlined above, which should be utilised by companies in transport and logistics to support IP-rightsholders in detecting and avoiding infringements. These include:

- Carrying out handover processes as required to identify signs of tampering
- Notifying suspicious consignments to authorities
- Complying with authorities' requests and facilitating their investigations where possible

Such a guidance document shall be accompanied by the **creation of a checklist**, which could be used by LSPs when an IPR infringement is suspected. The checklist should clearly state the actions that will have to be taken by a LSP, as well as the necessary contact points.

Conclusion

The European Freight Forwarding industry is ready to continue to support the upholding of IP-rightsholders' rights, provided the rules are proportionate, consider market reality and do not impose undue burdens on the industry. As such, CLECAT welcomes the introduction of an EU Toolbox against counterfeiting, which will be based on reported practices and principles developed in the context of various industry-led initiatives.

CLECAT stresses that in creating the toolbox, a clear differentiation must be made between the different types of service providers on the market, as LSPs cannot be considered as intermediaries in the same way as online platforms or trade intermediaries. Moreover, existing case law should be considered which shows that the services of an intermediary in relation to branded goods owned by another (i.e. trademarks) do not qualify as "use of the trademark in the course of trade", and thus, the intermediary cannot be held responsible for an infringement of IP rights in that regard.

Whilst LSPs are supportive of due diligence by inspecting suspicious consignments, it is unreasonable, disproportionate and impossible to oblige LSPs to proactively investigate, exchange information, supervise and implement systems for the detection of IPR infringements. Physical controls of the goods to detect counterfeits must stay with national or EU authorities, as it would be disproportionate to task LSPs to make informed, legally binding judgments on the authenticity of inspected goods, even for staff which is trained and employed to check goods for IPR infringements.

Therefore, CLECAT firmly believes that LSPs, handling hundreds of thousands of consignments daily for and behalf of their clients, cannot be held responsible and therefore liable for IPR infringements, as this is beyond their control.