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Eurasian Economic Commission updates recommendations on inclusion of licence fees in customs value of imported goods

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- In 2016 Eurasian Economic Commission issued recommendations on inclusion of licence fees in customs value of imported goods
- Updated recommendations establish important rules for calculation of customs fees for licensed goods imported into EAEU
- A key issue is whether mark owner controls source of goods or materials used to manufacture goods

On 18 August 2018 the Eurasian Economic Commission updated the Recommendations of the Eurasian Economic Union of 15 November 2016 Recommendations of the Eurasian Economic Union on Adding Licence Fees and Other Similar Fees For the Use of IP Rights to the Price Actually Paid or Due to be Paid for Imported Goods. These recommendations set up important rules for the calculation of customs fees for licensed goods imported into the territory of the Eurasian Economic Union.

The Eurasian Economic Union (EAEU) was formed on the basis of the Economic Customs Union. An agreement on its creation entered into force in January 2015 and it now includes five countries: Russia, Belarus, Kazakhstan, Armenia and Kirghizia. The most important feature of the EAEU is the principle of free circulation of goods and services within the union, which results in a unified customs border.

The creation of the union inevitably led to the acceptance of the principle of regional exhaustion of trademark rights in the member countries, and entailed starting work on a project to introduce a Eurasian trademark system (which is not implemented yet).

The abovementioned update to the recommendations was caused by the necessity to align the previous recommendations with the wording of the pending unified Customs Code of the Eurasian Economic Union, and thus contained mostly formal amendments; nevertheless, it was a good opportunity to improve the practical guidelines contained in the previous recommendations based on the customs practice developed during the first two years of implementation.

The general rule initially set up by the Customs Code of the Eurasian Economic Union is that the licence fees should be included into the price factually paid for the imported goods where two requirements are met:

- the licence fee relates to the imported goods; and
- the payment of the licence fee is a condition for the sale of the goods for export in the territory of the EAEU (if the fee is not paid, the goods are not allowed for export).

Since, in real life, the licensor and the supplier of the goods often differ, and it is not always clear when a licence fee really relates to particular imported goods, the recommendations set up some useful guidelines, for example: when such a licence fee should be calculated and when it is not considered as related to the goods, or when the export of the goods is not conditional on the payment of such a fee.

The main principle is that, where the trademark owner controls the source of the goods or the materials for the manufacturing of these goods, and the licence fee is calculated based on the number of goods actually sold, then the licence is said to be related to the imported goods (or materials for their manufacturing) and their export is considered to be conditional on the payment of the licence fee. If the licensee is free to choose a source for the goods or materials, then the licence is not considered as a condition for the export. For example, it is clearly stated that the licence fee which is paid in a fixed amount for the use of a trademark in marketing activities should not be considered as relating to the imported goods and, therefore, should not be added to the price factually paid for imported goods. Similarly, where the licensee is free to put the licensed trademark on any goods it imports from foreign manufacturers of its own choice, then the second requirement is not met (the export of the goods is not conditional on the payment of the license fee); therefore, again, the licence fee should not be added to the factually paid price of the goods.

The recent amendments to the recommendations also provide some useful examples of situations involving trademark licences, as well as examples related to know-how licences, which were lacking in the previous version of the recommendations.

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