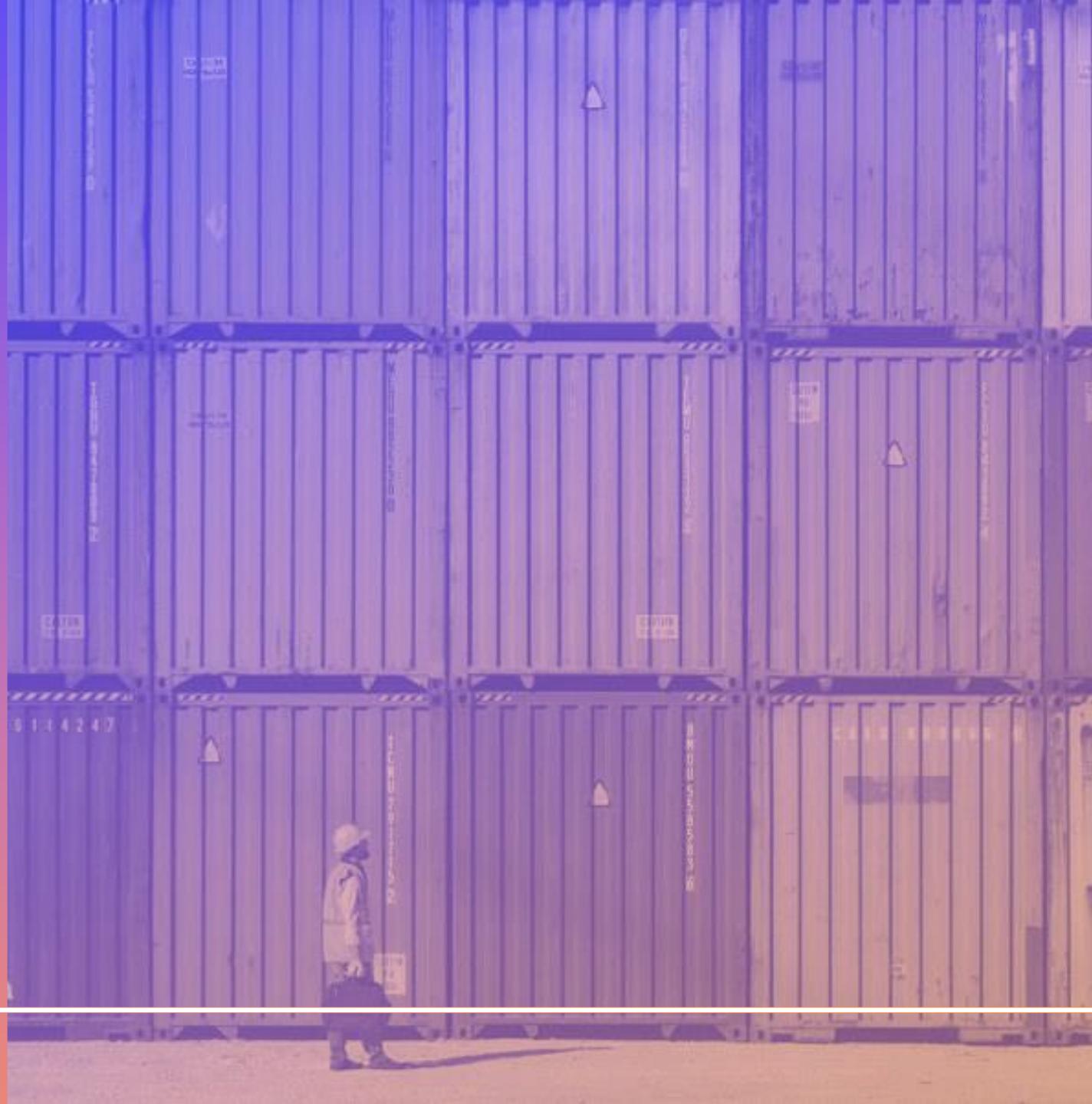


PARALLEL IMPORTS AND BORDER MEASURES: The Belgian and Dutch Perspectives

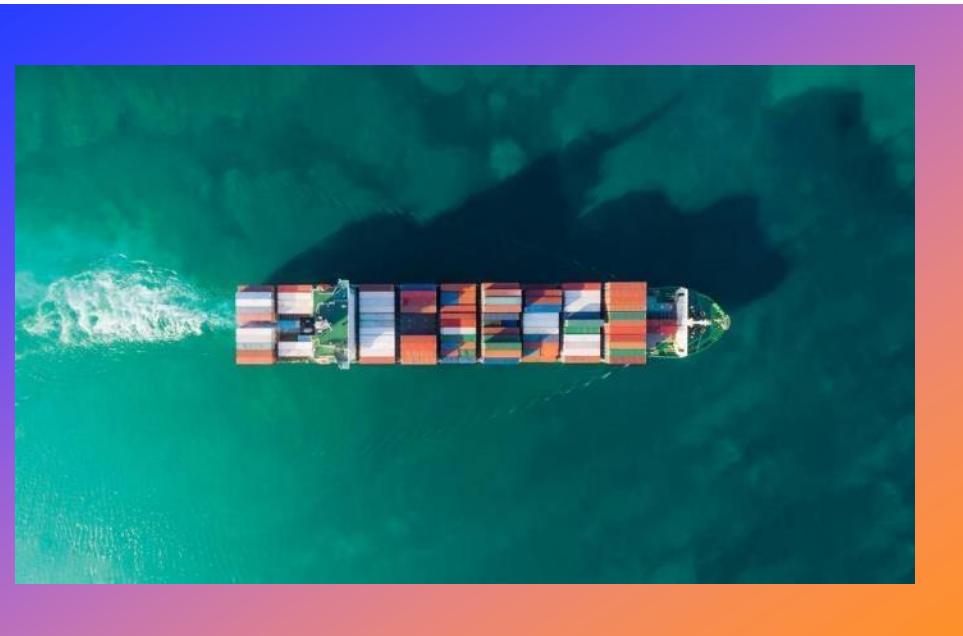
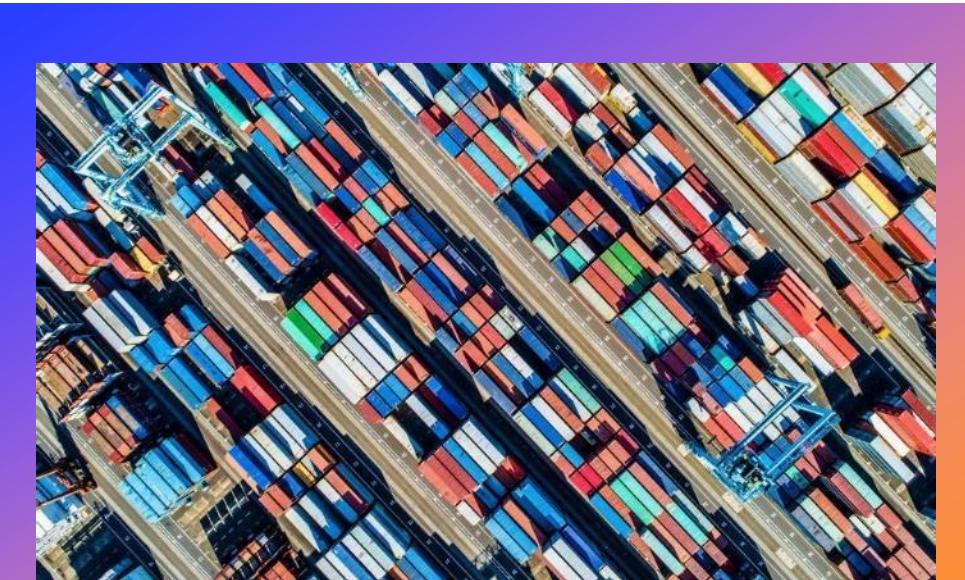
BMM, Utrecht, 30/09/2022

Timme Geerlof & Olivier Vrins



Outline

- INTRODUCTION
 - Parallel Imports
 - Border Measures
- MOCK CASES
- CONCLUSION



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INTRODUCTION

Introduction

Parallel Imports

- ❖ Cross-border trade of goods outside the manufacturer's distribution system without manufacturer's consent
- ❖ Parallel imports may increase consumer welfare because of lower prices
- ❖ Manufacturers want control over destiny of goods (differential pricing and IP rights)
- ❖ Free movement of goods: articles 34-36 TFEU

Introduction

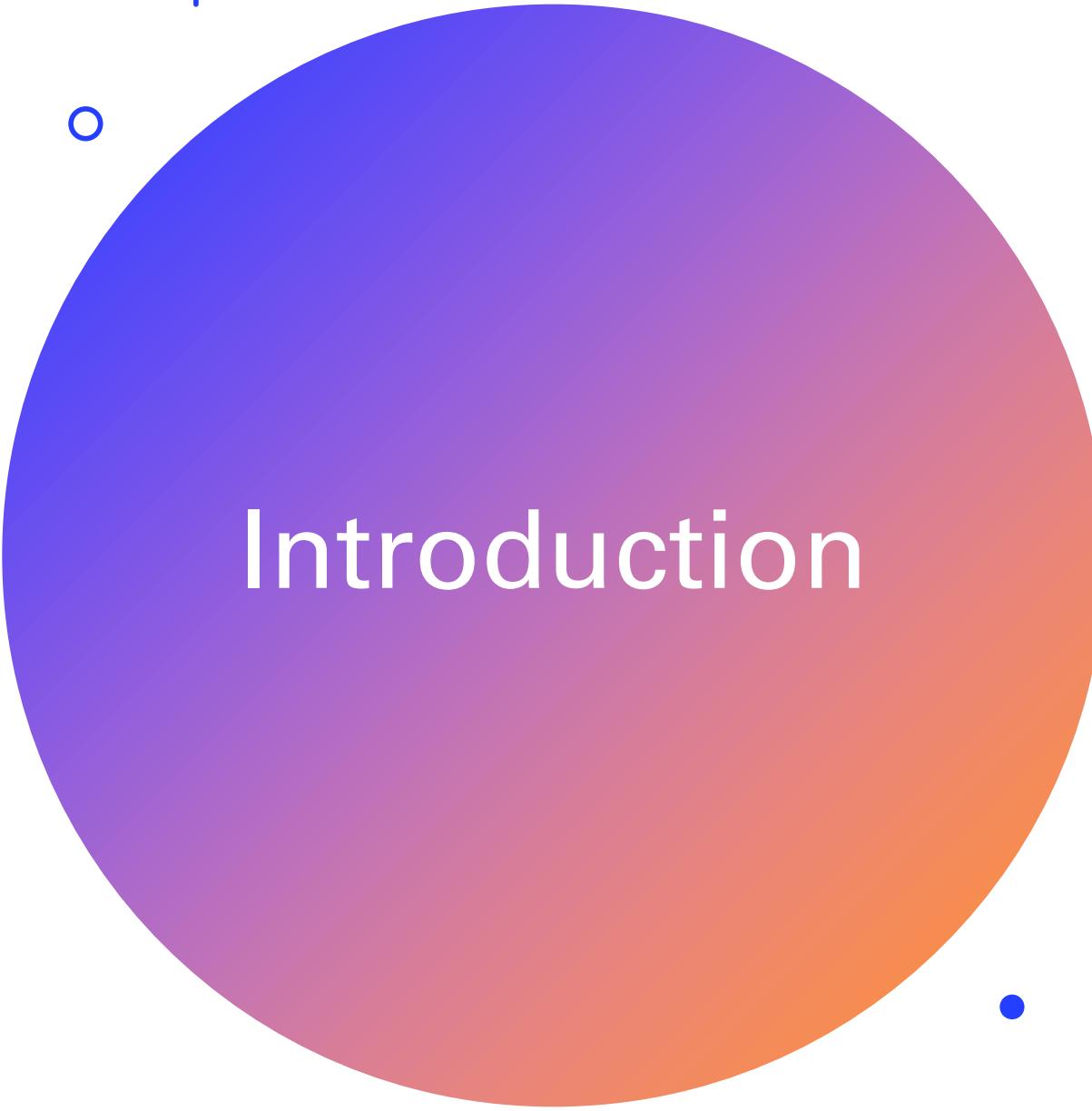
Exhaustion of Rights

- ❖ Right of first marketing
- ❖ 1980: Universal exhaustion → 'free movement of goods'
- ❖ 1983: Community-wide exhaustion → 'Fortress of Europe'
- ❖ 1998: *Silhouette* (C-355/96)
- ❖ Article 15 Directive 2015/2436 and article 15 Regulation 2017/1001
- ❖ Implications:
 - ❖ *Mitishibishu/Duma* (C-129/17)
 - ❖ *Silk Cosmetics/Notino* (ECLI:NL:GHDHA:2021:1926)

Introduction

Transit

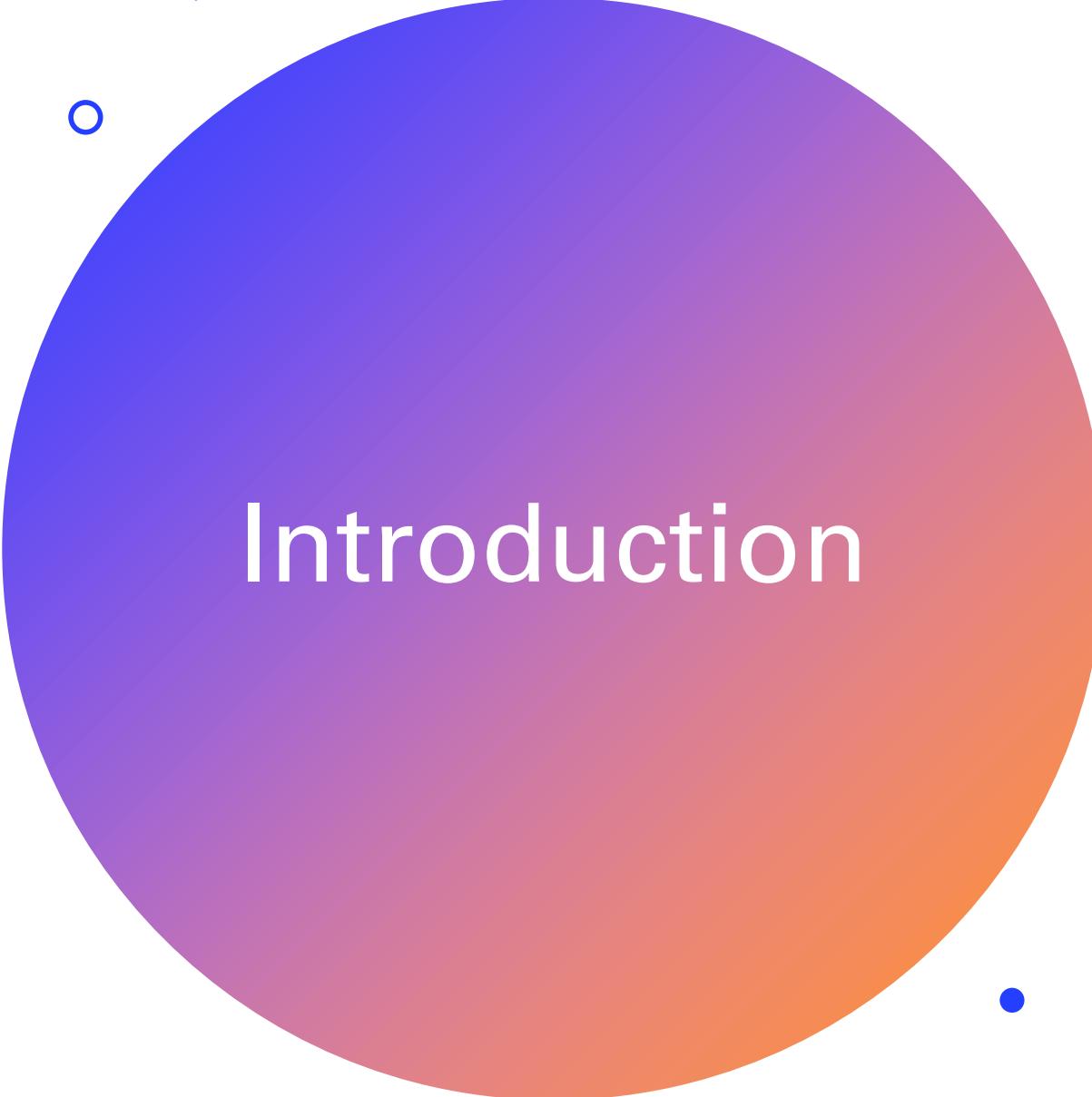
- ❖ WTO art V General Agreement on Tariffs and Trade (GATT)
- ❖ Case law
 - ❖ *Commission/France* (C-23/99)
 - ❖ *Rioglass* (C-115/02)
 - ❖ *HR 19 maart 2004, Philips/Postech*
 - ❖ *Class International* (C-405/03)
 - ❖ *Montex/Diesel* (C-281/05)
 - ❖ *The "Losartan" affair* (2009)
 - ❖ *Philips and Nokia* (C-446/09 en C495-09)



Introduction

Transit

- ❖ TM Package: Art. 9(4) Regulation 2017/1001 & Art. 10(4) Directive 2015/2436
- ❖ Commission Notice of 5/07/2016
- ❖ PDOs/PGIs
 - ❖ *Article 13(4) Regulation 1151/2012*
 - ❖ *Article 103(4) Regulation 1308/2013*
 - ❖ *Articles 1(3) & 21(4) Regulation 2019/787*
 - ❖ *COM(2022) 134 final*
 - ❖ *COM(2022) 174 final*



Introduction

Border Measures

- ❖ Regulation 608/2013
- ❖ EU Harmonization but...
- ❖ Regulation 2020/2035 (Northern Ireland)
- ❖ IP Enforcement Portal (IPEP)

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MOCK CASES

Mock Case 1

- Seizure of 1 container by Antwerp and Rotterdam Customs
- Legal Basis: Regulation 608/2013
- Perfumes bearing **YSL TMs**
- EU-wide AFA based on EUTMs for perfumes
- **Fakes**
- China → **Final destination unknown**
- Customs suspensive arrangement, no indication of threatened release for free circulation into EU



Mock Case 1: Fake YSL Perfumes

- **Customs Proceedings: Regulation 608/2013**

- Recital 10 & Article 2(7) Regulation 608/2013: suspicion of an infringement *in BE/NL*?
 - Article 9(4) EUTMR
- AFA covering relevant EUTMs → Article 17
- Article 23: Destruction or infringement proceedings

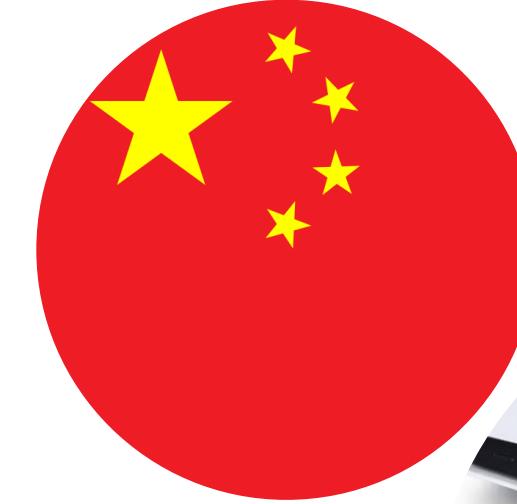
Mock Case 1: Fake YSL Perfumes

- **Infringement Proceedings**

- ***Where and against whom?*** Recital 12 Regulation 608/2013 → Articles 125-126 EUTMR
 - Article 125(5) EUTMR: Place of (threatened) infringement
 - *Article 9(4) EUTMR*
 - Article 125(1)-(4): Domicile or establishment
 - *Consignee/buyer unknown...*
 - *Intermediaries?*
 - *Consignor?*
- ***Type of action?***
 - Recital 17 Regulation 2017/1001, Recital 23 Directive 2015/2436: court '*competent to take a substantive decision*'
 - *Quid* criminal action?

Mock Case 2

- Seizure of 1 container by Antwerp and Rotterdam Customs
- Legal Basis: Regulation 608/2013
- Game consoles, [SONY's copyright \(no TMs\)](#)
- EU-wide AFA based on EUTMs for game consoles
- **Fakes**
- China → [France](#)
- Customs suspensive arrangement, no indication of threatened release for free circulation in BE/NL



Mock Case 2: Fake SONY Consoles

- **Customs Proceedings**
 - Recital 10 & Article 2(7) Regulation 608/2013: suspicion of an infringement *in BE/NL?*
 - ≠ Article 9(4) EUTMR → *Philips/Nokia*
 - Article 18 Regulation 608/2013 ('ex-officio') → national AFA within 4 wd
 - Not Article 13
 - Images of the goods: Article 18(2) & 17(4) Regulation 608/2013
 - Information on consignee, consignor, declarant/holder: Article 17(4)
 - Article 23: Destruction or infringement proceedings

Mock Case 2: Fake SONY Consoles

- **Infringement Proceedings**

- *Where and against whom?*

Recital 12 Regulation 608/2013 → Regulation 1215/2012 (Brussels Ibis)

- Article 7(2) Regulation 1215/2012: Place of (threatened) infringement
 - *Distribution?* (C-98/13, Blomqvist; C-572/17, Imran Syed)
 - Pres. Ghent EC, 28/01/2021, A/18/02980 (transit to FR ≠ distribution in BE)
 - Pres. Ghent EC, 28/01/2021, A/19/00140 (import in BE for delivery to FR ≠ distribution in BE)
 - Article 4(1) Regulation 1215/2012: Defendant's domicile
 - *Intermediaries?*
- *Type of action?*

Mock Case 3

- Seizure of 1 container by Antwerp and Rotterdam Customs
- Legal Basis: Regulation 608/2013
- Gin bearing Diageo's GORDON's TM
- **Genuine**
- EU-wide AFA based on EUTMs for spirits
- China → Brazil
- Customs suspensive arrangement, no indication of threatened release for free circulation into EU



Mock Case 3: Genuine GORDON's Gin

- **Customs Proceedings**

- Article 1(5) Regulation 608/2013: not parallel imports
- Article 2(7) Regulation 608/2013: *suspicion* of an infringement in BE/NL?
- Images of the goods: Article 17(2) & (4) Regulation 608/2013
- Information on consignee, consignor, declarant/holder: Article 17(4) Regulation 608/2013
- Right to inspection: Article 19(1) Regulation 608/2013
- Sampling? Article 19(2) Regulation 608/2013: '*in relation to counterfeit and pirated goods*'
- Article 57 TRIPS: '*where a positive determination has been made on the merits of the case*'?
 - Articles 17(2) & 18(2) Regulation 608/2013: '*Before suspending the release or detaining*'
 - BE/NL >< CZ/IT

Mock Case 3: Genuine GORDON's Gin

- **Further Proceedings?**
 - **Infringement: Article 9(4) EUTMR?**
 - Gerechtshof Arnhem – Leeuwarden, 15/01/2019: *yes*
 - Gerechtshof Den Haag, 30/04/2019 & 23/12/2020: *no* → C-405/03, *Class International*
 - **Type of action:**
 - Sekwester – Séquestre?
 - Beslag inzake namaak – Saisie-contrefaçon / Bewijsbeslag?
 - Main action: civil/criminal?
 - **Use of information obtained from Customs?**
 - Article 21 Regulation 608/2013
 - AG Colomer, C-132/07, *Beecham/Andacon*

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CONCLUSION



1. Regulation 608/2013: Up to a review?
 - a. *Art. 1(5): Parallel imports?*
 - b. *Articles 2(5)-(7)*
2. Transit:
 - a. Outcome *PM* case?
 - b. *Design 'package'?*

THANK YOU *ANY QUESTIONS?*

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