"Alone we can do so little; together we can do so much": The essential role of EU agencies in combatting the sale of counterfeit goods

Abstract

This article demonstrates the role and importance of EU agencies in the EU's regulatory environment, and considers the consequences of an absence of cooperation through agencies for internal security. It does so by exploring the case study of the anti-counterfeiting activities of the European Union Intellectual Property Office (EUIPO), and what happens when a state no longer benefits from membership of an EU agency. The effective protection of consumers from counterfeit goods is dependent upon identifying best practices, sharing information on counterfeiting trends, and coordinating responses, activities undertaken through EU agencies. This article demonstrates that the ability of states to effectively counter the sale of counterfeit goods is dependent upon the existence of EU agencies due to the need for transnational cooperation. In the absence of EU agencies, states are likely to suffer diminished operational expertise and a lack of in-depth knowledge concerning counterfeiting trends. It concludes that the EU agencies form an essential part of EU security governance, with states not party to these cooperative endeavours rendered vulnerable and unable to combat at a national level what is ultimately a global problem.

1. Introduction

In June 2017, as part of a coordinated action comprising Europol, the European Union Agency for Law Enforcement Cooperation, OLAF, the EU's anti-fraud agency, and the European Union Intellectual Property Office (EUIPO), with Europol's Intellectual Property Crime Coordinated Coalition (IPC3) taking the lead, more than 122 tonnes of potentially lethal counterfeit pesticides were seized as part of Operation Silver Axe II (Europol 2017). Cooperation between these EU agencies and national authorities was deemed by Europol to

be ‘crucial to the success of the action’ (Europol 2017), dependent upon close coordination, knowledge-sharing and data exchange, without which the operation would not have been a success (Megget 2017). Without effective information sharing and data analysis between states, real risks to human health are posed by counterfeit products. One example of this is the 2013 ‘horsemeat’ scandal, in which mislabelled meat products originating in Romania, advertised as containing beef, actually constituted horse and pig meat not intended for human consumption that was sold by supermarkets in the UK (Stones 2014). Countering these threats in globalised and transnational supply chains requires cooperation between national authorities, law enforcement and the private sector. In the EU, the facilitation of cross-border activity in a wealth of different sectors has been achieved through the creation of specialised agencies that act as coordination and information gathering entities, making otherwise infeasible actions possible. Furthermore, these agencies have been typified by task and competence expansion, including becoming integral components of EU policy-making and activity implementation (Egeberg, Trondal, and Vestlund 2015), and their functions essential in fields typified by cross-border activity where solely national action is ineffective. Yet what happens to a state party to such a system of knowledge and information sharing when it loses access to such an agency?

This article aims to demonstrate that when combatting complex security threats, such as those posed by the sale of counterfeit goods, the role of EU agencies in serving as centres of coordination, cooperation and operational expertise is absolutely essential to effective security governance. Counterfeiting, as will be discussed in this paper, is a type of offence that takes advantage of highly distributed global supply chains and trade routes to hide the origin of fake goods, presenting states with a transnational threat that cannot be faced on an individual basis. In particular, it shows that a harmonisation of the laws applicable to

intellectual property protection in the context of the internal market and Customs Union has not been sufficient in ensuring effective control of the counterfeit goods trade, but that the development of EU agencies tasked with implementing anti-counterfeiting policies in the context of the EU's Area of Freedom, Security and Justice (AFSJ) has been vital. In order to demonstrate the importance of these agencies in dealing with complex transnational threats, the UK's withdrawal from the EU ('Brexit') is used to provide an example of what happens in the absence of these forms of agency cooperation. It must be stated at this point that Brexit is in no way guaranteed, nor is the form of any agreement (or absence of one) definitive at this point in time. It does, however, provide an opportunity to consider the implications of losing access to well-established bodies such as EU agencies, both for the state losing access, as well as for the EU in securing its aims. It is also intended that the article make a broader contribution to the understanding of the role of the EU's agencies and agencification, beyond the immediate security example, as a means of facilitating access to the knowledge, coordination abilities and expertise required to provide effective regulation in areas of high technical complexity. While there have been considerable efforts dedicated to understanding the creation and role of these agencies as well as their legal forms and the effectiveness of their activities, there is a dearth of literature considering what happens when a Member State loses access to the operational expertise developed over a significant period of time, particularly in contexts involving cross-border activities and information that national authorities by their nature lack. This article seeks to demonstrate the importance of the agency responsible for the registration and protection of EU intellectual property, the European Union Intellectual Property Office (EUIPO) and its European Observatory on Infringements of Intellectual Property Rights (the European Observatory) in capacity-building, data collection, and the sharing of information and best practices as part of a

concerted anti-counterfeiting system. Additionally, it assesses the risks posed by its potential loss, an issue that has not yet been considered in the academic literature.

This article will begin by exploring the role of EU agencies in more detail, highlighting the importance of these agencies as sources of knowledge, expertise and collaboration between a variety of public and private actors. The article will continue by applying this framework to the establishment of the European Observatory, demonstrating the importance of this sub-division of the EUIPO agency in the effective enforcement of EU anti-counterfeiting laws and policies, linking EU agency functions to effective anti-counterfeiting actions. Finally, this article will consider the impact of the UK decision to withdraw from the EU in terms of the effects upon UK capabilities to effectively police the import of counterfeit goods as an example of the extent to which Member States rely upon these agencies. It will conclude by drawing conclusions on the vital role of EU agencies in effective security governance, and how the reliance on these agencies means that in their absence, states are rendered vulnerable. Regulatory convergence in the absence of multilevel networks facilitated through EU agencies is insufficient for dealing with complex problems such as those posed by counterfeit goods.

2: EU Agencies, Expertise and Knowledge

Since the reforms of the 1980s, motivated by the political and economic ideas concerning the role of the state, we have seen waves of market deregulation, market liberalisation and privatisation of state activities, which has been referred to as a process of state shrinkage. Instead, however, it is perhaps more accurate to think of the process as one of state transformation, to one of the 'regulatory state' (Majone 1994), or in the case of the EU, from

the ‘nation state to the member state’ (Bickerton 2012). The term regulatory state is apt; rather than seeing a bonfire of regulation and unrestrained market activities absent any oversight, we have instead seen a proliferation of governmental, non-government and quasi-governmental agencies that are tasked with performing the oversight that may have once been the exclusive prerogative of the state (see, for example Levi-Faur and Jordana 2005, 7; Braithwaite 2008, 8; J. S. Wright 2011, 31). In the context of the EU, the origins of agency proliferation are not in the school of New Public Management, but with the outsourcing of Commission regulatory functions in order to achieve uniform solutions to regulatory policy problems (Dehousse 1997) and facilitate the development of common standards of behaviour and practice (Majone 1997). Rittberger and Wonka provide an additional explanation, namely the desire to ensure that regulatory functions are shielded from the political considerations that may arise in the college of Commissioners that may serve to undermine the credibility of regulation should it be subject to political rather than functional concerns (Rittberger and Wonka 2011; see also Wonka 2007). The Commission has defined EU agencies as ‘agencies required to be actively involved in exercising the executive function by enacting instruments which contribute to regulating a specific sector’ (European Commission 2002, 4), such as network and information security or aviation safety. For Chamon, the best way of categorising these agencies for the purposes of law is as permanent bodies established under EU public law through secondary legislation, endowed with legal personality (2016, 10). These bodies have historically been established on the basis of a belief that assigning regulatory powers to ostensibly independent bodies frees them from political interference and sector-based capture (Wonka and Rittberger 2010; Hix 1998, 40; a view also held by the Commission, as evidenced in European Commission 2002, 5).Furthermore, the creation of EU agencies allows for the development of expertise in light of the increasing complexity of regulation as a sphere of activity (Thatcher 2002, 131–32). The resulting agencies are legally

constituted, in most cases, under Article 114 of the Treaty on the Functioning of the European Union, hereafter TFEU (see generally Fahey 2011; Chamon 2016, 141–43). This is permitted by EU law as a means of ensuring horizontal harmonisation by enabling regulatory supervision, as stressed by the Court of Justice of the European Union in a number of cases, which has reiterated the significant discretion of the EU to choose the most appropriate way of harmonising laws and functions, including through the establishment of EU agencies.[1]

Mirroring developments in Western Europe in the 1980s and 1990s (see generally Christensen and Lægreid 2007), the European Union has increasingly relied upon such agencies, beginning with the establishment of bodies such as the European Monitoring Centre on Drugs and Drug Addiction. This agency is tasked with creating and collating scientific evidence that the European Commission possessed neither the resources nor knowledge to attempt (Dehousse 1997, 252–53). These agencies are perceived to 'contribute to technical and sectoral know-how […and] is one way for the Commission to control the implementation of community regulation […] as well as securing expertise, credibility and visibility' (Trondal and Jeppesen 2008, 417–18). For the European Commission, 'the creation of further autonomous EU agencies in clearly defined areas will improve the way rules are applied and enforced across the Union' (2001, 23). With an emphasis on output legitimacy based in the high quality of technical evaluations and decisions (Borrás, Koutalakis, and Wendler 2007, 586), as of 2015 there are32 EUagencies which combine executive and quasi-regulatory functions (Egeberg, Trondal, and Vestlund 2015, 615). Regardless of concerns regarding both input legitimacy (Borrás, Koutalakis, and Wendler 2007), the accountability (Busuioc 2009),

[1] Cases C-359/92 *Federal Republic of Germany v Council (Product Safety)* EU:C:1994:306; C-66/04 *United Kingdom v European Parliament and Council of the European Union (Smoke Flavourings)* EU:C:2005:743; C-217/04 *United Kingdom v European Parliament and Council of the European Union (ENISA)* EU:C:2006:279; Case C-270/12 *United Kingdom v European Parliament and Council of the European Union (EMSA)* EU:C:2014:18; Case-358/14 *Poland v European Parliament and Council of the European Union (Tobacco Products Directive)* EU:C:2016:323

and independence (Arras and Braun 2017) of these agencies (topics of importance but ultimately outside the scope of this paper), they have become part of the EU's regulatory environment, or in the Commission's words, 'part of the institutional landscape' (2008, 2). These bodies typify what Black typifies as a 'polycentric' regulatory regime, comprising both national regulators and local, national and transnational private actors who are all engaged in the activities of that agency (2008, 140). While the EU agencies themselves are public bodies, they act as central nodes for a decentralised governance regime in which the line between state and non-state, or public and private, have been blurred, both in the realm of security governance and in the composition of EU agencies more generally (Shearing and Wood 2003).

The purpose of these agencies, as touched upon briefly above, is to gather and assess data, developing expert knowledge that the EU's organs such as the Commission or Council may not have the capacity or resources to develop (Majone 2000; Thatcher 2002), but can nevertheless rely upon in law and policy-making. According to Cardwell, the key to the success of these agencies is in their ability to facilitate regulatory networks, bringing together various national agency representatives, experts, and private stakeholders (2013, 541), helping to 'support the decision-making process by pooling the technical or specialist expertise available at European and national level' (European Commission 2008, 2), and thereby necessitating their hybrid, networked structure. Operating in diverse sectors, from food to aviation safety, to banking oversight, to border integrity and cyber-security, these agencies serve to bolster the credibility of the EU's policy actions in fields of technical complexity (Wonka and Rittberger 2010, 734–36). Non-state stakeholders are represented in more than three-quarters of EU agencies (Arras and Braun 2017, 2), based on the understanding that these stakeholders possess expert knowledge, and are therefore best

placed to contribute towards an effective and efficient regulatory system (see Maggetti and Verhoest 2014; Rittberger and Wonka 2011). In no field is this perhaps more apparent than in the management of risk and security. According to Bures and Carrapico (2017) the involvement of private actors in mediating security threats has moved beyond the selling of security services by private military security companies (for more on this topic see Abrahamsen and Williams 2011; Webber et al. 2004) to non-security sector actors taking an active role in ensuring the safety of the critical infrastructure they own, be it health care facilities, national electricity grids or banking systems (O'Rourke 2007). This has extended to private sector actors with knowledge of a particular sector being drawn into the regulatory sphere, going beyond the 'mere' enforcement of state-based regulatory standards (see for example Braithwaite 2008; Levi-Faur 2005) to the active development of those standards through participation in EU agencies. One such example is the European Network and Information Security Agency (ENISA, which is due to be renamed the European Union Agency for Cybersecurity, subject to the European Parliament's approval of the proposed EU Cybersecurity Regulation (2017)) in which private sector actors representing Internet and online service providers have worked together with national agencies under the auspices of ENISA to develop standards for the protection of network and information system security through identification of best practices, benchmarking of national NIS policies and compliance with international standards (Carrapico and Farrand 2017). This more informal, network form of governance became increasingly formalised, both through the EU's 2013 Cyber-Security Strategy, which reiterated the importance of the involvement of private sector actors in EU agencies (European Commission and High Representative of the European Union for Foreign Affairs and Security Policy 2013, 6) and the resulting Network and

Information Security Directive (Directive 2016/1148), which codified the practices and role of ENISA and private sector actors in ensuring network and information security.[2]

In the context of the EU and Brexit, as will be discussed in further detail later in this article, one of the ostensible aims of the UK's withdrawal from the EU is to 'take back control' of public policy, including control over customs and trade. However, as subsequent sections will demonstrate, the policy problem of counterfeiting (and its link to customs) is one that transcends national boundaries, and indeed the capacity of national authorities to effectively counter this form of criminal activity. As such, unlinking these issues of security and transnational threats from the EU agencies tasked with confronting them is exceedingly difficult. The development of a concerted regional approach to combatting the sale and dissemination of counterfeit goods will be looked at as an example of agency building, and how the resulting structures of the European Observatory under the auspices of the EUIPO have been essential to the development of operational expertise and critical information repositories and datasets. Regrettably, as will be shown, this is information that the UK is not effectively positioned to reproduce at a national level post-Brexit.

3: Regulating Counterfeiting: The Limits of Law and the Advantage of Agencies

In this section, we will explore the phenomenon of counterfeiting in more detail, identifying its links to other forms of criminal activity, the difficulties in controlling counterfeiting without coordinated regional action, and the development of a formalised agency structure as a means of more effectively regulating this security risk. Counterfeiting, and subsequently

[2] Directive 2016/1148 concerning measures for a high common level of security for network and information systems across the Union

the laws and policies of the EU concerning this phenomenon, lies at the nexus between the EU's activities as an economic actor and as a security one – in this way, the combatting of counterfeits is a goal that links the functioning of the internal market and external trade relations to the realisation of the AFSJ. It concerns both intellectual property and consumer protection, subjects ordinarily considered as falling within the domain of civil law, and criminal activities both organised and opportunistic, and the blurring divide between internal and external security. The Commission has commented that 'counterfeiting and piracy, which were once craft activities, have become almost industrial-scale activities. They offer criminals the prospect of large economic profit without excessive risk' (European Commission 2003b, 12). Not only do counterfeit goods free-ride upon the reputation of legitimate sellers, potentially depriving them of revenue and creating profits for illegal operators, but in certain markets, such as those for counterfeit cigarettes and medicines the actors involved in distribution are part of organised crime groups such as the Italian 'Ndrangheta, (Calderoni et al. 2014) as well as groups affiliated with religious and political extremism (Spink 2017). Producers of these goods are often involved in other criminal activities, particularly those originating in China (the main source of counterfeit goods in the EU), where the production is often overseen by organised criminals also involved in other activities such as narcotic distribution, illegal gambling and prostitution (see for example Shen and Antonopoulos 2017, 273; Europol and Office for the Harmonisation of the Internal Market 2015, 4). Furthermore, counterfeit products do not only pose the threat of economic harm, but also real and serious physical harm, whether from fake medicines and cosmetics containing toxic ingredients (Lavorgna 2015; Europol and Office for the Harmonisation of the Internal Market 2015), to faulty electronics (Stephan 2016) and badly made airplane parts (Lash 2005). According to Europol's 'Serious Organised Crime Threat Assessment' (SOCTA) report from 2013, 28.6% of all goods seized at EU borders constituted counterfeit

goods posing a direct risk to health and safety, covering 'foods and beverages, body care articles, medicines, electrical household items and toys' (2013, 22). For this reason, counterfeiting (which should be distinguished from copyright infringement in the form of piracy as discussed in Farrand and Carrapico 2012) is considered to present a security threat, both in terms of the threat to personal health and safety that faulty and fake goods present, as well as its link to the financing of other forms of serious crime, serving as an example of the crime-terror nexus (Sullivan et al. 2014; Carrapico, Irrera, and Tupman 2014).

Policies targeting counterfeiting in the European Union began to be discussed in the 1980s. In 1985, the Commission published a proposal for a Regulation intended to combat counterfeiting (European Commission 1984), defining counterfeit goods as 'any goods bearing without authorisation a trade mark registered in accordance with Community law or the law of a Member State in which the goods are entered for free circulation' (European Commission 1984 Article 1(2)). The European Parliament's Committee on Legal Affairs and Citizens Rights drafted a report in support of the Commission's action, noting that counterfeiting constituted a 'jargon' term, covering the making and/or selling of products similar to well-known products on the market, with the mark or name of the manufacturer of the original goods (European Parliament 1985, 13). What is readily evident is that since its first treatment in EU policy documents, counterfeiting has been perceived as an *external* problem with *internal* effects; the final Regulation (3842/86) as adopted emphasising in its recital paragraphs the focus on the importation of counterfeit goods from third countries into the (then) Community and need for effective customs enforcement as a means of identifying and seizing counterfeit goods, so as to prevent the considerable negative impact upon legitimate traders and consumers. The threat of counterfeit goods arises elsewhere, in third states, but the damage is felt, as Piatti argues 'in the national or "natural" markets of the

proprietor of the registered trade mark', namely the (now) EU (1989, 241). Waves of successive legislation[3] and academic commentary have demonstrated that this perception has not been ameliorated by time, but instead reinforced, as the realisation of complex global supply chains and increased trade between nations increases the likelihood of the establishment of new markets for counterfeit goods, new products to be the subject of counterfeiting, and new networks for their production and distribution, making the identification of counterfeit goods, the scale and effects of the problem, and the transit routes for these goods difficult to achieve (European Commission 1998, 10, 2003a, 2; Council of the European Union 2003, 16).

Indeed, it was this inability to effectively counter the effects of counterfeiting on the EU's internal market that led to the establishment of the European Observatory on Counterfeiting and Piracy under the auspices of the European Commission's Internal Market and Services Directorate-General in 2009. In 2008, the Council of the European Union published Conclusions on counterfeiting and piracy, in which it stated that it observed the 'seriousness and the worrying growth of the phenomenon of counterfeiting and piracy […and was] aware of the scale of this phenomenon on the Internet too' (2008, para. 10). In its Conclusions, the Council emphasised the need to 'mobilise all stakeholders to boost the effectiveness of the whole range of instruments for protecting intellectual property and combating counterfeiting and piracy on the internal market and internationally' (2008, para. 13), and recommended amongst a range of actions, the establishment of an observatory comprising public and

[3] Regulation 3842/86 was very quickly replaced by Regulation 3295/94 laying down measures to prohibit the release for free circulation, export, re-export, or entry for a suspensive procedures of counterfeit and pirated goods, which was amended several times, the last amendment of which was by amending Regulation 806/2003. This Regulation was then repealed, and replaced by Regulation 1383/2003 concerning customs actions against goods suspected of infringing certain intellectual property rights and measures to be taken against goods found to have infringed such rights, which was then repealed and replaced by Regulation 608/2013 concerning customs enforcement of intellectual property rights and repealing Council Regulation (EC) No 1383/2003.

private sectors working together to better identify the extent of the phenomena (2008, para. 15). In response, the Commission published an Action Plan in 2009, stating that 'consolidating public and private sector partnerships is also imperative to […making…] IPR enforcement work better, […] by complementing legislation with a range of non-legislative measures' (2009, 4–5). The desire to facilitate this public-private collaboration was in part influenced by a 2006 OECD study, which indicated that 'available information on counterfeiting and piracy falls far short of what is needed for robust analysis and for policymaking' (2006, 171), due to differences in rates of national reporting and lack of effective sharing of information, making the magnitude and effect of counterfeiting difficult to establish. Furthermore, the OECD study reported deficiencies in enforcement, arising from the same lack of cooperation, arguing that

> Industry has an important role to play […] as it has the experience and knowledge to efficiently complement government action. Its involvement in the enforcement effort is essential since: 1) rights holders have the technical expertise to distinguish counterfeits from original products; and 2) industry may have additional information regarding the functioning of distribution channels. (2006, 191)

The Observatory serves to remedy these defects in economic evidence and operational strategy that are perceived to hinder enforcement processes, with the Commission stating that it would constitute a 'platform for representatives from national authorities and stakeholders to exchange ideas and expertise on best practices, to develop joint enforcement strategies and to make recommendations to policy-makers' (European Commission 2009, 6). However, while considering the work of the Observatory vital, the Commission acknowledged that the structure of the Observatory, and its position as a sub-division within DG Internal Market and

Services was inherently limiting; on this basis, the Commission proposed transferring the expertise of the Observatory to the Office for the Harmonisation of the Internal Market (OHIM), allowing it to have access to additional expertise, resources and financing, as well as expanding its remit (2011d, 4–5). Having identified some of the key difficulties in combatting counterfeiting as being the lack of reliable data, insufficient coordination and exchange between authorities in the Member States of best practice, insufficient exchange of information between private sector experts and a lack of expertise on the part of those involved in intellectual property enforcement (European Commission 2011b, 7–11), the Commission concluded that in order to ensure a 'critical mass' of expertise, rather than establish the Observatory as an entirely new agency, merging its activities with those of OHIM would be the preferred option. As well as the somewhat more pedestrian justification of reducing costs, doing so would allow for the work of the Observatory to be more efficient, combining OHIM's already existing expertise and coordination networks in the fields of trade mark and design enforcement with the developing networks and expertise in counterfeiting of the Observatory (European Commission 2011b, 33). This subsuming of the Observatory into OHIM's structure was completed by Regulation 386/2012, renaming it the European Observatory on Infringements of Intellectual Property Rights, and providing a clear outline of the Observatory's activities under Article 2(2), mandating that it should meet with public and private stakeholders at least once a year under Article 4(1), as well as complementing those activities with additional working group meetings made up of public officials and private sector experts under Article 4(4). As of 2015, OHIM was renamed the European Union Intellectual Property Office as a result of the changes introduced by Regulation 2015/2424. Ironically, the Commission expressed reservations regarding the change of the name, stating that while it would accept it, 'it is regrettable that the new name does not represent the actual core activity and does not adequately reflect the fact that the

"Office" is an "agency" of the EU' (2015, 3). As an additional note, the renaming of the EUIPO did not follow the guidance of the European Parliament, Commission and Council on the naming of EU agencies provided in the 2012 Common Approach on EU decentralised agencies, which stated that all future agencies should use the standard naming convention of 'European Union agency for…' (2012, 3). Nevertheless, with this new legal underpinning, the Observatory was in a position to foster larger networks of expertise and identification of best practices in combatting counterfeiting.

According to an Impact Assessment (2011a) accompanying a Proposal for a Regulation on customs enforcement that would replace the 2003 Regulation (2011c), the Commission was clear that the work of the European Observatory had informed its approach to regulation in this field; reiterating that valuable data collection, gathering of expertise and identification of best practice that the Observatory had already achieved by 2011, it concluded that the training of customs officials would take place under the auspices of the Observatory (European Commission 2011a, 47). Stressing the importance of the Observatory's work in 'improving the collection and use of information and data; promoting and spreading best practice amongst public authorities, spreading successful private sector strategies and raising public awareness' (European Commission 2011a, 48), the finalised 2013 Regulation states in recital 20 that 'Customs authorities and the Commission are encouraged to cooperate with the European Observatory on Infringements of Intellectual Property Rights in the framework of their respective competences'. The cooperation of these customs officials, both with each other, and in the context of the Observatory, is ultimately based upon existing relationships of trust, and facilitated through formalisation of agency connections. The facilitation of a coordination, cooperation and information-exchange network was dependent upon the pre-existence of networks of cooperation developed in the context of the EUIPO and served as

one of the justifications for it being constituted there rather than as an entirely new agency. Yet what happens when these networked connections are in some way severed? This shall be discussed in the next section.

4: From Member of the Club to Untrustworthy Neighbour: What happens in the absence of agency cooperation in the field of counterfeiting?

In this penultimate section, we will consider the growing threat posed by counterfeiting, particularly in the context of the online sale of counterfeit goods, and use the case study of the UK's exiting of the EU to demonstrate the vital nature that these agencies play. According to the OECD, in 2016, 'the share of small shipments, mostly by post or express services, keeps growing due to the shrinking cost of such modes of transport and the increasing importance of Internet and e-commerce in international trade' (2016, 82). In order to effectively identify goods likely to be counterfeit, as well as likely shipping methods, transit routes and packaging types (making identification of small consignments *easier*, if not necessarily *easy*), the Observatory has worked with public and private stakeholders in a trust relationship to develop a series of databases, accessible only to national authorities in the EU, EU-based policy-makers, and EU-based companies. The first of these databases is ACIST, the Anti-Counterfeiting Intelligence Support Tool, which provides information on the counterfeited and pirated goods detained at all EU Member States' borders. ACIST does provide some general information to all users of the website, but more specific data on items seized at the EU's borders, as well as the number of cases and detention rates is only available to national authorities, EU agencies and EU-based private companies registered for use of the service. Similarly, ACRIS, the Anti-Counterfeiting Rapid Intelligence System is accessible only by EU-based companies affected by IP infringements in countries outside the

EU and information on the respective follow-up of these cases by local authorities. In order to access the information stored, an account must be requested, which is then reviewed and approved by the EUIPO. Finally, the EDB, or Enforcement Database, can only be accessed by IPR right-holders and national enforcement authorities, upon specific request to the Observatory, which will then determine whether the request can be approved. The purpose of this database is to collect information on IPRs likely to be affected by counterfeiting, including packaging, photos of the product as well as other logistic information, so as to assist law enforcement in identifying fakes. In this respect, the creation of EU agencies has been essential to the development of the information systems required to ensure that anti-counterfeiting activities can be effectively carried out.

What does this mean for the UK upon its withdrawal from the EU? The first thing to bear in mind is that when the UK leaves, it is highly likely that it will cease to be able to fully take part in the EU agencies, particularly in the event that the UK leaves without any formal agreement with the EU. This looks increasingly likely, given the recent vote to accept the Withdrawal Agreement with the EU was rejected in the House of Commons in one of the biggest governmental defeats in parliamentary history. Firstly, Regulations will cease to have effect in the UK post-Brexit. Regulations have general application to Member States under Article 288 TFEU, which will of course mean that there will be substantial gaps in the UK legal order as a result of withdrawal, in fields such as customs (Łazowski 2016, 1298), as well as intellectual property rights. The legal basis for the establishment of the EUIPO and indeed the EU trade mark under Regulation 2017/1001 is Article 118 TFEU (European Commission 2013, 5), which allows for the establishment of centralised Union-wide authorisation, coordination and supervision arrangements for the uniform protection of intellectual property rights in the EU, so as to ensure the functioning of the internal market. It

would appear, then, to make little sense that the UK would leave the single market and yet remain part of the EU trade mark and EUIPO. That the UK will no longer be part of this system of trade mark protection is evident from the EU's draft Withdrawal Agreement, which states in Article 50(1)(a) that the holder of an EU trade mark will automatically become the holder of a national trade mark in the UK. In terms of agencies, the UK's decision to initiate the Article 50 procedure resulted in the relocation of the UK-based EU agencies, on the basis that if you are not a Member State of the EU, you are no longer part of its institutional structure, which includes its agencies. The UK has sought to argue that it will be able to continue its membership of certain agencies, including Europol, subsequent to its withdrawal (EUobserver 2017; Chazan and Bond 2018). However, to do would ultimately require that the UK attain a working arrangement[4] similar to that of Norway or the US, which is negotiated on a bilateral basis. As the House of Lords European Select Committee made clear, however, this process is highly technical and negotiations are lengthy, 'being measured in years, not months' (2016, para. 52). It must also be stated that while Europol is legally permitted to enter into working arrangements, under Article 23(1) of the Europol Regulation (2016/794), which allows it to establish and maintain cooperative relations with the authorities of third countries, international organisations and private parties. In comparison, however, Regulation 2017/1001 provides for no equivalent powers for the EUIPO, and at the time of writing, there are no countries that have 'partner' status or associate membership of the EUIPO. For this reason, upon withdrawing from the EU, it is probable that the UK will have not be a member of, and indeed will have no formal legal access to, the EUIPO. This also entails loss of access to the Observatory and the ACIST, ACRIS and EDB systems. Had

[4] Prior to 2016, Europol was able to enter into cooperation and strategic agreements with third states. However, with Regulation 2016/794, while all previous agreements continue to have force under Article 25(1)(c). Under Article 23(1), the new form of cooperation is in the form of an 'arrangement', which is concluded not with a state, but with that state's relevant authorities. It is also worth noting that under this Regulation, Europol's full name changed to the European Union Agency for Law Enforcement Cooperation, demonstrating that the EUIPO could have also stuck to the new naming convention.

the House of Commons accepted the Withdrawal Agreement, access to these databases may have been facilitated under Article 8 of the Agreement for the duration of the transition period, but this does not appear to be likely now. This will leave the UK in a position where it loses access to valuable operational and strategic data, information on trends and trade routes for counterfeit goods, and participation expert group meetings concerning the identification of best practices in combating counterfeiting. This is not information the UK possesses, nor which it is able to effectively develop at the national level, due in no small part to the global and diffuse nature of counterfeiting as a public policy problem. For Member States that have been reliant upon EU agencies as a central node in regulatory networks, as well as sources of information, the loss of access implied has grave repercussions on the ability of the state to manage its security against the types of threats that these transnational networks were created to counter.

Furthermore, the ability of the UK to govern its own customs borders are also likely to raise concerns for the EU. Could it be that the UK is badly equipped to police the transit of counterfeit goods in the absence of the protections afforded by being part of the Customs Union? Leaving aside completely many of the legal, social, political, cultural and historical headaches that the Northern Ireland-Ireland border represents, which increasingly seem to be problems without solutions (for a non-exhaustive list of problems identified, ranging from immigration to labour to cross-border purchases see Birrell and Gray 2017; Braniff and Whiting 2017; Hayward, Campbell, and Murphy 2017; Soares 2016), the UK's ability to manage the import of counterfeit goods into the UK appears to be somewhat limited, with repercussions for the EU. As mentioned at the beginning of this section, one of the largest increases in the movement of counterfeit goods is through small consignment (defined as postal or express courier consignments that contain three units or less or which weigh less

than two kilogrammes under Article 2(19) of Regulation 608/2013), constituting 70% of cases of seized counterfeit goods (Europol and European Union Intellectual Property Office 2017, 13). Most of these consignments are facilitated by Internet-based transactions, where the supplier is based outside of the EU and sells directly online to an end user based in the EU, minimising risk for the seller and making identification of these goods in transit incredibly difficult (see Farrand 2018, 8; see also Schneider and Maillefer 2015; Treadwell 2012). Consider then the problem of the Northern Ireland border. For historical reasons, having a hard border between the UK (i.e. Northern Ireland) and Ireland is politically infeasible. For this reason, the EU has demanded that the UK impose no hard border, instead creating something of a maritime border between Northern Ireland and the rest of the UK for the purposes of customs enforcement, with Northern Ireland 'considered part of the customs territory of the Union' under Article 4(2) of the Protocol on Ireland/Northern Ireland, EU-UK Withdrawal Agreement. This has been deemed politically unacceptable to the Democratic Unionist Party (DUP) of Northern Ireland, which has publicly stated that it would not accept the imposition of a 'border' between Northern Ireland and the rest of the UK (Bell 2017), and played a major part in the House of Commons rejecting the Withdrawal Agreement.

UK proposals on how customs enforcement would work on this basis, including the possibility of 'creative solutions' based upon new technologies (see HM Government 2017) have been dismissed by the EU (O. Wright and Coates 2018), as well as technology experts who have described the proposal as fanciful and unworkable. In a House of Commons Northern Ireland Affairs Committee hearing in March 2018, it was concluded that the technologies that the UK government had referred to are 'still in their infancy and require commercial goods vehicles to cross the border line at designated customs posts. Both Norway and Switzerland also apply Single Market rules which obviates the need for regulatory

compliance checks' (2018, 28), meaning that even states using these types of technology rely upon a level of regulatory convergence with the EU that the UK government has declared politically unacceptable. If we leave aside haulage to consider only individuals travelling across the border with small consignments ordered from the Internet, then counterfeit goods may arrive in the UK, and then be transferred to Northern Ireland for transport by individuals into the Ireland, meaning that the UK becomes a *transit route* for counterfeit goods, rather than just a potential destination. There may be little confidence in the UK being able to effectively monitor the transfer of individual consignments and seize counterfeit goods moving across this border without the imposition of hard border controls already deemed politically unacceptable to both sides in the negotiations. This will be of particular concern when considering markets for counterfeit pharmaceuticals – the UK has been a target country for producers of fake medicines, the majority of which are based in China and India and have key transit routes such as Hong Kong (OECD and European Observatory on Infringements of Intellectual Property Rights 2017, 35), in part due to reasons of historical ties. The Observatory and Europol have found that UK customs have seized the highest percentage of fake medicines in the EU at 24% of all seizures, despite only have 11% of overall legitimate trade in pharmaceuticals, and is considered a 'high risk' country (Europol and European Union Intellectual Property Office 2017, 72). Only Bulgaria had a higher rate of seizure compared to legitimate imports, with Europol concluding that this was potentially due to it being an attempted point of entry to the EU for this type of product (2017, 72). In comparison, Ireland, which borders the UK, is considered a 'very low risk' country for counterfeit medicine entry into the EU (2017, 71). With the UK leaving the EU, the possibility for the EU is that a Member State previously considered a high-risk point of entry becomes a high risk third country of transit. Pharmaceuticals could either be mailed to intermediaries in the UK or arrive in large consignments at UK ports. Given concerns over

the ability of the UK to manage the number of imports received at Dover, with a need for more than 5,000 more customs staff (Acton 2017), and belief on the part of the UK Trade Facilitation Expert Panel that an effective customs management system will not be in place until 2025 (Blitz 2017), the UK could then become a key regional hub during this time of uncertainty for counterfeit pharmaceuticals. If for reasons of political infeasibility the customs border between Northern Ireland and the rest of the UK is a 'soft' border, so as to not enflame tensions in Northern Ireland, these medicines could then be transported to Northern Ireland and thereby enter the customs area of the EU, with the possibility of those goods then being either transferred by road to Ireland, or otherwise shipped to other countries in the EU. The combination of the UK's loss of access to the European Observatory, and with it operational expertise, coupled with concerns over future capacity to act in the absence of knowledge of counterfeiting trends facilitated through access to databases such as ACIST is likely to result in the UK being regarded not as a security partner in combating counterfeit goods, but instead as an untrustworthy neighbour, a transit route for unsafe goods, and a vulnerable entry point to the Customs Union. What makes the UK more insecure through loss of EU agency expertise may serve to make the EU more insecure by extension.

5: Conclusion: The Importance of Agency Expertise in Combatting Security Threats

As this article has sought to demonstrate, effective regulation in areas of technical complexity is dependent upon effective cooperation between public and private sectors across borders, particularly when seeking to manage issues of security such as the trade in counterfeit goods posing threats to human health and safety. Yet this cooperation necessitates parties have formal governance structures to facilitate this cooperation, such as through EU agencies. In the field of anti-counterfeiting policies in intellectual property law enforcement, the role of

the EUIPO and European Observatory in facilitating networks of cooperation allowing for the sharing of operational information and technical expertise has been essential in providing valuable data on counterfeiting trends, risks and transit routes, as well as establishing best practices in identifying and seizing counterfeit goods and bringing cases to trial in front of an informed judiciary. In this way, the development of effective anti-counterfeiting policies and activities cannot have taken place without the creation of EU agencies facilitating these forms of coordination and cooperation. A single state, even an EU Member State or state with approximated laws on counterfeit goods simply lacks the information and capacity to deal with counterfeiting as a multi-faceted security threat. Particularly in the case of a state such as the UK, which already relies upon these agencies and the information they possess, it is exceedingly difficult to see how they can operate as an individual state without severely impacting the effectiveness of their customs enforcement. In the hypothetical example provided, the UK risks becoming perceived as unreliable both in terms of its capacity and its capability to prevent the importation of counterfeit goods. This presents a potential security risk to the EU's AFSJ as the UK becomes a possible transit route for unsafe consumer products. More generally, this article has demonstrated that agency relationships provide a wealth of information and operational expertise, allowing for greater capacities for actionon the part of national authorities, and that as states become more dependent upon these agencies, there is considerable potential for serious and unforeseen consequences should those agency relations cease. In areas of significant complexity, whether in the field of intellectual property protection, or in other fields such as cyber-security, medicines approval or food safety, very local problems are often the result of very global activities. Their solutions, by necessity, must also be global, or as the saying goes, 'Alone we can do so little; together we can do so much'.

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