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# New decree brings clarity and stronger administrative sanctions against violations involving counterfeit and illegal goods

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- **Decree No 98/2020/ND-CP, which will enter into force on 15 October 2020, seeks to remedy the shortcomings of Decree No 185/2013/ND-CP**
- **'Intellectual property counterfeit goods' are no longer listed as 'counterfeit goods'**
- **The fines for a number of violations have increased under the new decree**

## Background

After six years of enforcement, a number of provisions in Decree No 185/2013/ND-CP dated 15 November 2013 on sanctions for administrative violations in commercial activities, the production of, or trading in, counterfeit or banned goods, and the protection of consumer rights ('Decree 185') were found to be impractical in light of the changes to trading practices. In addition, a number of terms and regulations were not clearly explained or were no longer consistent with newly enacted or amended regulations - such as the Intellectual Property Law (amended in 2019), the Penal Code 2015 (amended and supplemented in 2017) and the Competition Law 2018 - and with the new structure of authorities such as the Police and the market surveillance authority.

To address these issues, on 26 August 2020 the government of Vietnam promulgated Decree No 98/2020/ND-CP on sanctions for administrative violations in commercial activities, the production of, or trading in, counterfeit or banned goods, and the protection of consumer rights ('Decree 98'), replacing Decree 185. The new decree will enter into force on 15 October 2020.

The most significant changes brought about by the new decree are summarised below.

## Interpretation of the term 'counterfeit goods'

The definition of 'counterfeit goods' in Article 3.8 of Decree 185 includes 'intellectual property counterfeit goods', such as:

- Counterfeit goods which have no valuable use; goods whose uses are not consistent with their nature, names, or announced or registered functions;
- Goods for which the amount of primary substances, nutrients or other technical properties only reaches 70% or lower compared to the quality standards and technical regulations registered, announced or written on their labels/packaging;
- Medicines for humans and domestic animals that contain no pharmaceutical substances, for which the amount of pharmaceutical substances is not consistent with the registered specification, do not contain all the registered pharmaceutical substances, or contain pharmaceutical substances other than those stated on their labels/packaging;
- Plant protection products that do not contain active ingredients, for which the amount of active ingredients only reaches 70% or lower compared to the quality standards and technical regulations that were registered or announced, do not contain all the registered active ingredients, or contain active ingredients other than those stated on their labels /packaging;
- Goods using labels/packaging that counterfeit the names and addresses of other traders, trademarks/brand names, circulation licence numbers, bar codes or the packaging of other traders;
- Goods whose labels/packaging contain fraudulent information about the origin of the products or the place where the goods were produced, packaged and assembled; and
- Counterfeit stamps, labels and packaging.

Under Article 213 of the IP Law, 'intellectual property counterfeit goods' include counterfeit trademark goods (ie, goods or packaging incorporating a mark or a sign which is identical to, or substantially indistinguishable from, a protected trademark or geographical indication) and pirated goods.

In practice, although this has not been consistently applied by the authorities, the list of 'counterfeit goods' in Decree 185 (which is now replaced by Decree 98) has been used as a reference for distinguishing the offence of "manufacturing, trading in counterfeit goods" under Article 192 of the Penal Code, which is subject to more severe criminal sanctions, and the offences of "infringement of copyrights and relating rights" and "infringement of industrial property rights" under Articles 225 and 226 of the code.

Under the new decree, 'intellectual property counterfeit goods' are no longer listed as 'counterfeit goods'. Thus, it is expected that, in the future, goods using identical trademarks or geographical indications or pirated goods may no longer be considered by the enforcement authorities as 'counterfeit goods' for determining criminal liability under Article 192 of the Penal Code, unless they fall within one of the categories of goods defined in Decree 98, as listed above. Instead, they will likely be treated as "infringing goods", and acts of infringement shall be subject to criminal liability under Articles 225 and 226 of the Penal Code; if the thresholds for these two criminal offences are not met, the acts will be subject to the administrative fines and remedies set forth in Decree 99/2013/ND-CP on Sanctioning Administrative Violations in the Field of Industrial Property.

### **Increased fines**

The maximum fine level is set out in Article 4 of the new decree. The maximum fine in the field of commerce and the protection of consumer interests is D100 million (approximately \$4,300) for individuals and D200 million (approximately \$8,600) for organisations. Meanwhile, the maximum fine in the field of manufacturing and trading in counterfeit and banned goods is D200 million (approximately \$8,600) for individuals and D400 million (approximately \$17,300) for organisations.

The fine levels for a number of violations have increased under the new decree, and some have even roughly doubled in comparison with Decree 185. For example, according to Article 11 of Decree 98, the act of trading in goods bearing a counterfeit label or using a counterfeit packaging may be sanctioned by a fine of up to D200 million (approximately \$8,600), while the fine for the same violation in Decree 185 did not exceed D120 million (approximately \$5,200).

### **Specific provision sanctioning the act of trading in counterfeit goods on the Internet**

While Decree 185 does not contain a specific provision concerning the act of trading in counterfeit goods on the Internet, the new decree specifically provides that the act of providing information on, or trading in, counterfeit goods, or goods or services infringing IP rights or banned goods or services on the Internet may be sanctioned by a fine of up to D40 million (approximately \$1,700).

### **Competence of Vietnam General Department of Market Surveillance**

Decree 98 also includes new provisions on the competence of the market surveillance authorities, from national to local levels, in sanctioning administrative violations. These provisions are compatible with the new structure of the market surveillance authority, which has been upgraded from the Market Surveillance Department to the General Department of Market Surveillance under the Ministry of Industry and Trade under Prime Minister Decision No 34/2018/QD-TTg dated 10 August 2018.

### **Comment**

It is hoped that the changes brought by Decree 98 will help the work of the enforcement authorities when taking action and imposing sanctions against violations involving IP rights infringements and counterfeit goods, both offline and online.

**Thao Nguyen**

IPMAX Law Firm

**Duc Duong**

IPMax Law Firm

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