Strengthening the criminal law framework to combat intellectual property offences

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COMMISSION'S IMPACT ASSESSMENT

For further information concerning the background to this issue, please refer to the summary of the Commission's initial proposal of 12 July 2005 for a Council Directive introducing measures aimed at ensuring the enforcement of intellectual property rights – COM(2005)0276.

Note: This document refers to a package of 2 proposals tabled by the Commission dealing with: 1) the introduction of measures aimed at ensuring the enforcement of intellectual property rights (please refer to summary of procedure CNS/2005/0127) and 2) a strengthening of the criminal law framework to combat intellectual property offences.

1- POLICY OPTIONS AND IMPACT

The Commission examined four potential policy options.

1.1- Option 1: Leaving the approximation of penal measures up to the discretion of Member States, while promoting awareness among consumers of the damage caused by counterfeiting and piracy. This first option consists of combating the demand for counterfeit or pirated products by creating awareness among consumers, in particular by organising information campaigns against counterfeiting. However, even if an awareness campaign is very useful not to mention necessary, it cannot on its own be considered to constitute a policy combating counterfeiting.

1.2- Option 2: Action at international level. Counterfeiting and piracy are phenomena that have been the focus of attention of a certain number of international organisations that contribute to the combat against counterfeiting. The best known manifestation of this work undertaken at international level is the TRIPS agreement which lays down minimum provisions on means of enforcing trade-related intellectual property rights concluded on 15 April 1994 and which entered into force on 1 January 1995). However, even if the majority of WTO members have now adopted legislation aimed at implementing these minimal standards, the incidence of piracy and piracy has continued to rise year after year. For some years, other types of actions have been carried out at international level (for example, the Interpol Intellectual Property Crime Action Group). The Commission is also involved in various actions at international level (the adoption on 10 November 2004 of a strategy aimed at contributing to an improvement of the situation in third countries). However, if action at international level is required, it has to be reinforced by internal mechanisms within the Union that are based on high standards.

1.3- Option 3: take counterfeiting and piracy into account in police and judicial cooperation texts. Certain cooperation mechanisms are laid down for certain types of infringements: this involves texts that seek to improve police and judicial cooperation between the Member States adopted under Title VI of the TEU. These instruments seek to assist the fight against serious crime, in particular organized crime. There is the proposal for a framework decision adopted by the Commission concerning a European evidence warrant aimed at obtaining objects, documents and data for use in proceedings in criminal matters (see CNS/2003)0270). However, this could never replace the creation of a legislative platform on the criminal law front.

1.4- Option 4: introduce a specific instrument to deal with this crime within the Union. To respond effectively to the counterfeiting and piracy phenomenon within the European Union, **two texts** could be envisaged to supplement current provisions and, in particular Directive 2004/48/EC concerning the enforcement of intellectual property rights: one text under the first pillar and a second under the third pillar:

- a proposal for a **Directive** which could ensure that all intentional infringements of an intellectual property right on a commercial scale, and attempting, aiding or abetting and inciting such infringements are treated as criminal offences. The text is accompanied by various criminal sanctions: these could include, for individuals, imprisonment and, for both individuals and legal persons, fines, confiscation of the goods in question, as well as materials, instruments or supports that serve in the production or distribution of the goods.

- a second text, taking the legal form of a **Framework-Decision** which would complement the provisions of the Directive and would lay down measures for the approximation of criminal legislation and cooperation under Title VI of the TEU.

CONCLUSION: The Commission selected **Option 4** because it was the only one that could offer the Community the solution of **a common minimal criminal penalty**.

IMPACT :

Whereas it is necessary to look at the positive impacts of the measure, it needs to be borne in mind that, for the most part, they will only result in a reduction in illegal activities while the absence of a measure would have the effect of aggravating the consequences.

Improvement of cooperation between police forces and judicial authorities

The level of cooperation between the authorities competent to investigate, pursue and judge counterfeiting and piracy offences will be improved. The authorities responsible for the application of the law will be granted appropriate powers of investigation. The establishment of contact points for the exchange of information will facilitate and accelerate the investigations. The agreement of competence criteria should prevent any conflicts of competence arising and the common investigation teams will ensure the cross-border approach that is vital in the fight against counterfeiting and piracy.

Reduced crime

Heavier sanctions with the introduction of minimal levels of maximum penalties, as well as the improvement in cooperation will make it more difficult and dissuade infringements of intellectual property rights. The measures taken have to have a dissuasive character by creating a sense of insecurity among criminals. These classic criminal law mechanisms will reduce the attraction of counterfeiting and piracy for criminal organisations and will contribute to the overall reduction in the levels of the crime.

Impact on businesses

Reduced levels of counterfeiting and piracy will naturally be reflected in a drop in the financial losses of those companies that are victims to these crimes. The measures to ensure enforcement of intellectual property rights are designed to protect both large and small companies, in particular those that are active in design and innovation.

Impact on employment

The damage suffered by companies due to intellectual property infringements has an effect on the volume of jobs their industries can offer, although this effect is hard to measure accurately. The effectiveness of measures taken under criminal law will result in the fight against counterfeiting and piracy being strengthened and, as a consequence, to improve the employment situation in the Community. To the extent that counterfeiting, in its most serious forms, contributes, as do other criminal activities, to fuelling illegal work, the dismantling of criminal organisations using criminal legislation should contribute to improving the state of the employment market.

Impact on investment and competitiveness of European companies

Companies should benefit from an equivalent level of protection throughout EU territory. This favourable context will reassure companies in regard to the trust they place in the internal market for developing their creative and innovative activities in an environment that has been made more secure;

Impact on tax receipts

The illegal by nature trade in counterfeit or pirated goods deprives the State of considerable tax receipts (VAT, customs duties, etc.). The effective combat of these phenomena will reduce the amount that States would have missed out upon in terms of tax receipts.

Improvement of awareness of the criminal nature of intellectual property infringements

The benefit of the enhanced criminal penalties in the framework defined above is likely to result in the increased awareness of decision-makers, players and the public. In the first place, the individual consumer, who has take responsibility for his actions, has to be made understand that his actions are not without consequence. In second place, the players have to be made aware of the penalties. In fact, it has been observed that criminal proceedings on the basis of the infringement of an intellectual property right are generally rare and the judgments of limited scope.

2- FOLLOW-UP:

The measure will be followed up as part of the work of the Forum on the prevention of organised crime in conjunction with the representatives concerned from the public and private sectors. Furthermore, the Member States, in collaboration with the Commission, will have to carry out an objective and impartial evaluation of the implementation of the measures adopted, by the authorities of the Member States.