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NOTE

from : General Secretariat
to: Working Party on Customs Union (Customs Legislation and Policy)
Subject : EU Customs Action Plan to combat IPR infringements - Second review

Delegations will find attached a document on the above subject, prepared by the Commission services in collaboration with the Council Presidency, as agreed by the Working Party at its meeting on 13 December 2010. Changes compared to document 16902/1/10 REV 1 are underlined.

DRAFT

**SECOND REVIEW OF THE EU CUSTOMS ACTION PLAN TO COMBAT IPR
INFRINGEMENTS FOR THE YEARS 2009 TO 2012
FOR THE PERIOD JANUARY - DECEMBER 2010**

This review was prepared by the Commission services, in collaboration with the Council Presidency and is based upon contributions from the Member States.

SECOND REVIEW OF THE CUSTOMS IPR ACTION PLAN

INTRODUCTION

The European Union is committed to establishing and maintaining a strong level of protection for the intellectual property of its citizens and companies and to ensuring the effective and adequate enforcement of such rights against infringements. The political importance accorded to the enforcement of intellectual property rights (IPR) was highlighted in the Council Resolution of 25 September 2008 and the customs response to the trade in IPR infringing goods was considered to be a critical element in the overall strategy to tackle the problem.

A new EU customs Action Plan to combat IPR infringements for the years 2009 to 2012¹ was subsequently agreed in March 2009. The new plan took into account four main challenges that had identified by the Customs Directors General of the Member States and the Commission, namely the potential dangers to society, the link to organised crime, the globalisation of the trade in IPR infringing goods and the sale of counterfeits over the internet.

A review mechanism was also foreseen in the Action Plan to monitor the implementation of the activities contained in the plan. This mechanism provided for the Commission to present a review, in collaboration with the Council Presidency at the end of each year of the Action Plan and for a more detailed report to be prepared in the last year of the Action Plan.

This document contains a review of the second year of implementation of the plan, from January to December 2010 and is based upon contributions received from Member States. The review follows the structure of the Action Plan, which contains the following sections:

- Legislation and data tools.
- Operational performance.
- Business cooperation.
- International cooperation.
- Raising awareness and communication.

¹ OJ C71, 25.03.09. Council Resolution of 16 March 2009 on the EU Customs Action Plan to combat IPR infringements for the years 2009 to 2012.

OVERVIEW

The Commission's communication "Europe 2020"², issued in March 2010, underlined the importance of strengthening knowledge and innovation, for smart and sustainable growth and in promoting a competitive economy. As a fundamental component of innovation, IPR protection remains a key priority and the continuing concerns relating to the trade in IPR infringing goods, particularly in a globalised economy has had a profound influence on the customs agenda throughout 2010. The political priority accorded to IPR was further underlined recently, in the Commission communication, "Towards a Single Market Act"³, where the importance of promoting and protecting creativity was highlighted.

This was the second year of the Action Plan's implementation and much of customs work relating to IPR enforcement concerned on-going activities. Administrative cooperation, as well as cooperation with the business community were recorded as priority activities by Member States and in October, an important workshop was organised to consider the impact of IPR infringing goods sold via the internet. This workshop pointed towards new working methods and stakeholders on the industry side, such as internet service providers not previously involved with customs on this issue, were invited to contribute.

In addition to overseeing the implementation of operational activities in the Action Plan, the Commission and the Member States customs administrations have been involved in a number of related initiatives, that have impacted on some of the key activities in the plan.

The review of the customs legislation applicable to border enforcement of IPR, included a public consultation and though the review is not yet completed, the public consultation drew attention to the diverging interests of a wide range of stakeholders. Other external factors have also provided input to the review process, notably the dialogue with India and Brazil, within the framework of the WTO Dispute Settlement Procedures.

² Communication from the Commission: 'Europe 2020: A strategy for smart, sustainable and inclusive growth' of 3 March 2010, COM (2010) 2020.

³ Towards a Single Market Act - For a highly competitive social market economy (doc. 13977/1/10 REV 1).

The negotiations on a new Anti-Counterfeiting Trade Agreement (ACTA⁴) were stepped up during the course of 2010 and included a significant customs component. A text was finalised in November, subject to a legal review and a decision by the EU on whether to accept the agreement will now be taken through the appropriate EU institutional procedures.

In the international domain, the main priority in the Action Plan concerned the need to strengthen cooperation with China and it was agreed to extend the dedicated EU-China customs IPR action plan until the end of 2012. During the course of the year, the Commission and Member States worked closely with Chinese counterparts to develop a network of IPR customs experts in selected airports and seaports in the EU and China to target suspect counterfeit and pirated goods shipped directly between the two parties. IPR enforcement was also a key theme at the conference held at the Shanghai Expo in September on EU-China customs cooperation, where the role of industry on this issue was particularly highlighted.

These elements are detailed further in the review of the different sections of the Action Plan.

LEGISLATION AND DATA TOOLS

The Action Plan sets out a number of issues to be covered by the review of the customs legislation applicable to IPR border enforcement, as requested by the Council in its Resolution of 25 September 2008. This opening section also covers data tools and the development of a Community-level electronic system for applications for action and a database for recording customs seizures and related statistics.

The main issues to be covered in the review were identified in the new 2009-2012 Customs Action Plan endorsed by the Council, namely:

- The need to clarify the situations in which customs may take action, for example where suspect goods were found whilst in transit. The customs legislation is intended to provide provisions on IP enforcement, not establish possible infringements of rights conferred to a right holder by substantive IP law.

⁴ The current parties to ACTA are the United States, Japan, the EU, Switzerland, Australia, New Zealand, Singapore, Morocco, Mexico, Korea and Canada.

- The lack of harmonisation in the procedures enabling customs to deal with infringing goods abandoned for destruction in a simplified way. The current regulation does provide for a simplified procedure, though it is not mandatory and has not been implemented in all Member States.
- The burdensome nature of applying the provisions to small consignments suspected of infringing IPR. Customs are confronted with increasing numbers of small consignments containing goods suspected of infringing IPR, in particular those resulting from internet sales.
- The costs of storage and destruction of goods and the concerns raised by right holders regarding their financial responsibilities under the current regulation.

A working group comprising of experts from the Commission and certain Member States was created to consider the basic customs legislation, Council Regulation 1383/2003⁵ and the findings of this group were then shared with all other Member States in the framework of the Customs Code Committee – counterfeit section at the end of 2009. In parallel, the Commission services reached out to other interested stakeholders including right holders and industry federations in a series of informal consultations, where feedback was also provided on the application of the current legislation. To ensure all stakeholders were given ample opportunity to contribute to this process, the Commission decided to carry out an open public consultation through the internet. The period of the consultation was initially set from 25 March to 25 May 2010 and following requests from several stakeholders the deadline was extended to 7 June 2010.

The Commission is currently preparing a draft Commission proposal to modify Council Regulation 1383/2003⁶. The precise timetable for the completion of the work is not finalised, due to certain external factors, though the submission by the Commission of a proposal is now currently scheduled for the first semester of 2011.

⁵ Council Regulation (EC) No 1383/2003 of 22 July 2003 concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights. (OJ L 196, 2003)

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One Member State drew attention to the submission of contributions to on-going cases at the Court of Justice of the European Union and several Member States provided guidance on the applicable legislation.

The other main initiative covered by this section concerns the proposal for an EU system to store applications for action from right holders electronically, onto a database at the EU level. The concept reflects national systems in certain Member States, with the additional advantage that the information collected would be available to all concerned Member States. The COPIS system will also include a data collection component, to record customs activities relating to IPR enforcement at the border.

During the course of 2009, the Commission services, in close collaboration with Member States, developed the necessary user requirements and secured financing for the project entitled COPIS (Counterfeit and Piracy System). The planning of the COPIS system has been discussed in detail with the Member States, in the framework of the Electronic Customs Group, most recently on 19 November and the current timetable indicates the start of operations in January 2012.

OPERATIONAL PERFORMANCE

The Action Plan identified several activities to further strengthen operational performance, including the development of activities for sharing best practices and the promotion of the Community risk management system to protect IPR. This section also focused on the implications of the growing problem concerning the trade in counterfeit goods via the internet.

As previously, Member States reported numerous examples of sharing best practices and of close cooperation between administrations, through benchmarking exercises, training and exchange visits not only within the EU, but also with third countries, mostly involving neighbouring countries (Nordic, Balkan and eastern Europe). In some cases, the industry side was also involved in the exchange of best practices.

Several Member States linked activities related to customs controls in the area of product safety to this section of the Action Plan, as well as to the actions against illicit movement of goods.

Involvement in reinforced controls was widespread and even where the action targeted other issues such as drug precursors, Member States indicated an awareness of possible impacts on IPR risk criteria and the traffic of IPR infringing goods.

Member States underlined the growing concern of IPR infringing goods entering the EU in small consignments and the Customs 2013 seminar organised in Paris, on counterfeiting and the Internet was warmly welcomed. The main goals of the seminar were to exchange information on how customs monitor the Internet and notably the phenomenon of counterfeit goods sold via the Internet, as well as to explore possible ways to improve the efficiency of Customs controls on counterfeited goods in relation to small consignments.

The event responded to a specific activity contained in the Action Plan and was perceived by the participants as the first step towards a response at the EU level to the phenomenon. The seminar produced robust conclusions that included a recommendation to each administration to provide for a customs structure responsible for the fight against counterfeiting via the Internet. To this end, commitment was made to exploring the possibility of creating a national office in each Member State dedicated to the fight against fraud via the Internet. On the basis of the seminar's recommendations, the European Commission undertook to establish an experts' group in order to support the activities of Member States concerning the general policy measures relating to the fight against counterfeiting via the Internet and the exchange of best practices.

As previously reported, a minority of Member States were already actively tackling the specific problems posed by the sale of IPR infringing goods via the internet. This was an area where there appeared to be a certain expertise which could be shared further with other customs administrations and it was hoped that the seminar in Paris would lead to further collaboration between administrations and private sector stakeholders.

Member States reported on initiatives concerning the strengthening of cooperation with other enforcement authorities, notably the Police and this is an area, which the Commission considers should be developed further. Collaboration between customs and other stakeholders also appeared to be focused on the potential risks to the health and safety of consumers and to the environment.

Several Member States indicated initiatives to develop cooperation on issues such as product safety, for example by the secondment of health inspectors to work with customs.

Some Member States selected well known sporting events, including the football World Cup and the hockey championships, to conduct targeted IPR operations, as foreseen in the Action Plan. One Member State drew attention to the need for an application for action to be introduced ahead of the next Olympics. To this end the Member States might consider the necessary steps for coordinating action in relation to upcoming events that are being hosted within the EU.

Nearly all Member States provide training and have dedicated training materials concerning IPR enforcement, including in some cases the use of e-learning modules. The situation is considered to be satisfactory.

BUSINESS COOPERATION

The main emphasis in this section has been to promote the role of customs to enforce IPR at the border and to explain the possibility to apply for protection of one's rights, as well as on the need to ensure a certain quality of the applications for action submitted.

Over the years, the number of applications recorded in the annual reports on EU customs enforcement of intellectual property rights has steadily increased. In 2000, there were less than 1,000 applications submitted by right holders; in 2005, the number had increased to over 5,000. However, in 2009, the most recent figure available, the number of applications across the EU had risen to almost 15,000. Member States have continued to promote the submission of applications and to raise awareness of this option through participation in trade fairs, as well as dedicated activities for small and medium enterprises. In order to raise awareness, most Member States organised seminars, presentations, forums and training courses industry federations, right holders and legal representatives. In addition, Member States published relevant material on their websites and in some cases, provided for the online submission of applications for action.

The Action Plan also advocated the promotion of special arrangements with right holders and other stakeholders, concerning cooperation and exchange of information. Some Member States did not report developments this year as a number of arrangements had already been concluded previously, notably with regard to airlines, express mail and postal services, as well as with major private sector bodies such as international industry federations and chambers of commerce.

Increasingly, there is recognition on the need to develop partnerships with a broad range of private stakeholders, including in relation to the Internet, e-commerce operators and on-line payment providers.

Some Member States also had less formal arrangements, or were in the process of drawing up protocols with other enforcement authorities, to facilitate enforcement and in particular, the exchange of information.

There remains a wide divergence of situations between Member States regarding the electronic exchange of information with the private sector. In some cases, little more than e-mail correspondence is provided for, whilst in others, customs offer full electronic communication, using a certified digital signature. Some Member States provide for the electronic submission of applications for action, through nationally developed systems, whilst others are now waiting for the EU-level system, COPIS, to come on-line. However, even in Member States where there is not yet a dedicated electronic system for applications, right holders may be invited to submit applications and other information, such as photos electronically.

Most Member States indicated that the use of the red alert and general trend forms, launched by the Commission to facilitate the submission of additional information by right holders, either on new trends or to alert customs about specific consignments were included on national customs websites. During the year, specific actions were taken to raise awareness of these forms, though little information was recorded about whether the forms were actually used. One Member State did report that although the forms had been actively promoted in 2010, the forms had only been used by right holders, in two cases.

Member States also provided information to right holders concerning customs procedures relating to IPR enforcement, through a wide variety of instruments, including websites, emails, manuals and instructions to right holders.

INTERNATIONAL COOPERATION

In 2009, the implementation of the dedicated action plan concerning EC-China customs cooperation on IPR was a key priority and not surprisingly, this initiative remained a priority this year. At the meeting of the EU-China Joint Customs Cooperation Committee (JCCC), which took place in Shanghai on 3 September 2010, it was agreed that the cooperation on the fight against counterfeit and piracy should be extended until the end of 2012. The extension of the EU-China Action Plan is expected to be signed at the occasion of the High Level Economic Dialogue in Beijing on 20-21 December. The four key actions remain the same:

Systematic exchange and analysis of seizures, trends and general risk information.

Creation of networks of customs in key ports and airports to target high risk consignments.

Exchange of practices on means of providing seizure information to assist other administrations in stopping production and winding up distribution networks.

Joint development of partnerships with business communities in the EU and China.

A review of the first year of the EU-China Action Plan's implementation was submitted to the JCCC at the meeting in September. In essence, there was agreement, that the Plan was a useful and potentially significant tool for the enforcement of IPR in trade between the two parties. Some progress had been recorded on all four key actions, though there was a need to strengthen the cooperation further to make any real impact on the illicit traffic in counterfeit and pirated goods.

Both sides recognised the importance of developing the network of experts in airports and seaports and on the EU side, this action involved locations in 8 Member States. Some information was exchanged through the networks, though below expected levels taking into account the overall traffic in IPR infringing goods recorded in the annual customs statistics. In November, the Commission organised a further series of technical meetings with the Chinese side in Hang Zhou, involving the network experts, to remove any obstacles to the development of the information exchange. The discussions were fruitful and improvements are anticipated, though the situation will be monitored closely.

A draft roadmap for the implementation of the EU-China Action Plan was also discussed in Hang Zhou. It is hoped that the roadmap could be agreed before the formal signature of the extended plan in December, though it would remain a living document open to further modification to take account of the evolution of the cooperation between the two sides.

Effective international cooperation is considered to be an essential component in tackling the globalisation of counterfeiting and the trade in IPR infringing goods. In the WCO, the Counterfeit and Piracy (CAP) Group provides a forum to exchange views, experiences and practices on the border measures against counterfeit and pirated goods. The EU participated in the CAP Group, contributing towards the identification of needs and towards the preparation of capacity building activities.

However, in 2010, the major pluri-lateral initiative concerning IPR enforcement concerned the continuation and conclusion of negotiations for an Anti-Counterfeiting Trade Agreement (ACTA). Several rounds took place during the course of the year, culminating in a final negotiating round in Tokyo in September. The ACTA text was subsequently finalised and is now under consideration within the EU institutions. ACTA aims to establish a comprehensive, international framework that will assist ACTA Parties to combat the infringement of intellectual property rights effectively, which undermines legitimate trade and the sustainable development of the world economy. It is intended to include state-of-the-art provisions on the enforcement of intellectual property rights, including provisions on civil, criminal, and border enforcement measures, robust cooperation mechanisms among ACTA Parties to assist in their enforcement efforts, and the establishment of best practices for effective IPR enforcement.

As far as border measures are concerned, the final text does not live up to the EU's initial ambitions, though is still considered to be a step forward from existing international standards. In particular, ACTA provides for a broad range of IPR to be covered by the border measures, rather than simply trademarks and copyrights, as foreseen in TRIPS. ACTA also foresees the introduction of mandatory provisions concerning ex-officio action by customs, as well as controls for IPR purposes at export, at least on an ex-officio basis.

Without prejudice to a decision concerning the EU's acceptance of the final text of ACTA, the border measures do provide a new baseline for future bilateral negotiations where IPR issues are addressed, such as the FTA negotiations with Singapore and Canada. In this context, specific provisions on border measures complementing and further clarifying international IPR obligations remain a priority in all bilateral agreements under negotiation with relevant trading partners. Other initiatives include the dialogues with third countries on intellectual property and various technical assistance projects, including ECAP in Asia and the IPA Regional Program on industrial and intellectual property rights in the Western Balkans and Turkey.

The Commission, together with the Member States was heavily involved in the WTO Dispute Settlement Procedures with India and Brazil. For more than a year, India has repeatedly expressed concern with EU customs enforcement of IPR. Concerns were first raised by India in relation to a few shipments stopped by Dutch customs at the end of 2008, suspected of infringing patent rights in the Netherlands, although the goods were in transit from India to other third countries in South America and Africa. Despite certain initiatives taken by the Commission on behalf of the EU and regular bilateral contact with the Indian authorities, India and Brazil both decided to launch formal proceedings against the EU in May 2010. The Commission has repeatedly reiterated the EU's commitment towards WTO rules on freedom of transit, as well as on access to medicines.

There were two rounds of consultations between the parties, as well as intensive discussions to find a satisfactory solution, though to date, the situation has not yet been resolved.

Several Member States have also strengthened bilateral cooperation with key trading partners, considered to be source countries for IPR infringing products, through exchanges, study visits, seminars, coordination projects and similar activities. Joint actions are a key factor in the fight against counterfeiting and piracy and a number of Member States participated in operational activities organized by international organizations such as the WCO and Interpol.

RAISING AWARENESS AND COMMUNICATION

The last section of the Action Plan concerns raising awareness and communication. The objective is two-fold; to raise awareness and communicate on the issue of the trade in IPR infringing goods and on the means of protection offered to right holders by customs, as seen in the earlier section on business cooperation.

Each year, the Commission publishes a report on EU customs enforcement of IPR, which is picked up by media organisations around the world. The 2009 report was presented to the press at a technical briefing in July and received wide coverage. One Member State also organised a successful media event in coordination with the publication of the EU report.

The annual reports provide credible evidence of the important role of customs in the enforcement of IPR, as well as raise the profile of customs in general terms. The statistics are compiled from data collected from the Member States and are used widely, as little other data is available about the extent of counterfeiting, piracy and other IPR infringements. The establishment of the European anti-counterfeiting and anti-piracy Observatory aims to fill that gap, by developing a methodology for collecting appropriate data. Another function of the Observatory is to raise awareness of relevant issues. Customs are already involved, though there is little to report on at this stage, as the activities of the Observatory are still being rolled out.

Member States all reported interest in developing awareness raising activities, often linked to the publication of statistics or the result of a specific case. Health and safety aspects were also particularly highlighted. Communication was done through different media outlets, including TV, radio, the Internet and leaflets at airport, train stations, trade fairs and department stores. One Member States authorised a customs official to participate on a regular basis in a national TV travel show, to speak on various customs travel issues, including the traffic in counterfeit and pirated goods.

Member States organised a variety of campaigns, several of which concerned medicines, including one about counterfeit medicines sold over the Internet, “To be on the safe side”. The campaign was presented as a security partnership between customs and the network of chemists. Another Member State focused on toy safety. Travellers at airports and other border crossing points were also the subject of campaigns where passengers travelling to certain destinations were targeted and provided with leaflets.

Despite the variety and quantity of such initiatives, there was little evidence of coordination between enforcement authorities as well as with other Member States. Though the latter may be explained by cultural differences, the Action Plan does foresee coordination of communication activities at the EU level and the issue is worthy of further consideration. A notable exception concerns the forthcoming European Football Championships, EURO 2012, where a governmental group has been set up within one Member State.

CONCLUSION

Activities relating to all sections of the Action Plan were recorded during the period of the review, demonstrating the engagement of customs authorities towards IPR enforcement and the implementation of the Action Plan. Further engagement is necessary to ensure the Action Plan delivers on the objective to provide the necessary legislative and administrative framework for customs to enforce IPR at the border in the most efficient and effective manner.

In particular, the review of the current legislation should be completed and the Commission should present legislative proposals, as well as any non-legislative proposals considered to be appropriate, in a timely manner.

The COPIS project, the future electronic system for applications for action, should be monitored closely during the course of 2011 to ensure its implementation remains on track for the start of 2012.

The workshop concerning the impact of counterfeit goods sold via the internet, should be seen as the first initiative at the EU level to tackle [...] the phenomenon; small consignments presents significant resource implications for customs and is an issue that should be taken forward next year, [...] taking into account the recommendations that were drawn up at the workshop.

With regard to operational performance, further initiatives at the EU level should be encouraged, for example with regard to forthcoming well known sporting events. Particular attention should also be given to the effective implementation of the operational activities contained in the specific arrangements with China. Although one of the key actions with China, the exchange of information through networks of experts at airports and seaports, only involves at present, the 8 Member States participating in the networks, all Member States are concerned and encouraged to promote the development of customs cooperation, as provided for in the EU's Agreement with China on customs cooperation and mutual administrative assistance, as well as in the framework of the Action Plan itself.

The review noted different initiatives by customs authorities concerning raising awareness and communication, though there was little evidence of effective coordination between authorities. Consideration could be given to developing a specific communication strategy at the EU level.

In order to assess the impact of activities and to measure the effectiveness of the Action Plan, consideration should be also be given to developing a more detailed mechanism to provide feedback on the different initiatives.