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OUTCOME OF PROCEEDINGS

of : Working Party on Substantive Criminal Law

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No. prev. doc. : 9446/07 DROIPEN 40

9195/1/07 REV 1 DROIPEN 38

10109/07 DROIPEN 51

10105/1/07 REV 1 JAI 268 DROIPEN 52 ENV 295 MI 144 PI 25 TRANS 192
MIGR 46 ECOFIN 238

No. Cion prop. : 8866/06 DROIPEN 31 PI 27 CODEC 405 COM(2006) 168 final

16989/06 COMER 234 PESC 1331 CONOP 82 ECO 205 UD 134 AT0 177
COM(2006) 829

Subject : a) Amended proposal for a Directive of the European Parliament and of the Council on criminal measures aimed at ensuring the enforcement of intellectual property rights

b) Proposal for a Council Regulation setting up a Community regime for the control of exports of dual-use items and technology
- Opinion of the Working Party on Substantive Criminal Law on the measures provided for in Article 15(2) and Article 21, fourth sentence, concerning the (substantive and formal) criminal law of the Member States

c) "Violent Video Games"
- Draft Council conclusions

d) Procedure for the future handling of legislative files, containing proposals of the first pillar, relevant to the development of criminal law policy.
Report by the Presidency

I. INTRODUCTION

The **Working Party on Substantive Criminal law** met on 4 June 2007 to discuss the above mentioned items. In particular, the Working Party focused on the European Parliaments legislative Resolution¹ on the amended proposal for a Directive of the European Parliament and of the Council on criminal measures aimed at ensuring the enforcement of intellectual property rights.

Furthermore, the Working Party examined the draft Council conclusions with regard to the Violent Video Games² and the future handling of legislative files containing proposals of the first pillar relevant to the development of criminal law policy³ and discussed in details its opinion on the measures provided for in Articles 15 (2) and 21, fourth sentence, of the proposal for a Council Regulation setting up a Community regime for the control of exports of dual-use items and technology.⁴

II. THE DISCUSSIONS

a) Amended proposal for a Directive of the European Parliament and of the Council on criminal measures aimed at ensuring the enforcement of intellectual property rights.

- Examination of the European Parliament's legislative resolution (25 April 2007, 1st reading)

1) Introduction

Opening discussions, the Chair indicated that the Working Party should take position concerning the above mentioned European Parliament's Resolution, taking into account the fact that since one year the Working Party did not discuss the difficult legal issues with regard to this instrument.

¹ Doc. P6_TA-PROV (2007) 0145.

² Doc. 10109/07 DROIPEN 51.

³ 10105/07 JAI 268 DROIPEN 52 ENV 295 MI 144 PI 25 TRANS 192 MIGR 46 ECOFIN 238.

⁴ 9195/1/07 REV 1 DROIPEN 38.

In particular, the Chair reminded the Working Party that, the Commission submitted on 2 May 2006 an amended proposal for a Directive of the European Parliament and of the Council on criminal measures aimed at ensuring the enforcement of intellectual property rights. The amended proposal for a Directive replaced the earlier Commission proposals for a Directive and a Framework Decision (COM(2005) 276 final). The provisions of the earlier proposals have been incorporated into the amended proposal. The legal basis given for the amended Commission proposal is Article 95 TEC (the establishment and functioning of the internal market).

By judgment of 13 September 2005, the European Court of Justice annulled Framework Decision 2003/80/JHA on the protection of the environment through criminal law (C-176/03 Commission v. Council). The Court decided that as a general rule, neither criminal law nor the rules of criminal procedure fell within the Community's competence; however, this finding did not prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities was an essential measure for combating serious environmental offences, from taking measures which related to the criminal law of the Member States which it considered necessary in order to ensure that the rules which it laid down on environmental protection were fully effective. On this basis, the Court ruled that the Framework Decision encroached on Community competence, and did not respect Article 47 TEU.

The Commission submitted a Communication to the Council and the Parliament on the consequences of the Court's judgment (COM(2005) 583 final). The amended proposal of 2 May 2006 referred to above for a Directive on criminal law measures aimed at ensuring the enforcement of intellectual property rights, was issued in line with this Communication.

The Council of Justice and Home Affairs Ministers considered the matter on 6 October 2006, on the basis of 13013/06 DROIPEN 59 PI 48 CODEC 958 and came to the following conclusions, adopted by COREPER on 21 February 2007 :

- "Bearing in mind the principle of subsidiarity, further scrutiny is needed with regard to the need of criminal measures at EU level to protect intellectual property rights.
- **The Presidency¹ will discuss with the incoming Presidency² the possible ways of handling the substantive provisions of the instrument** while awaiting the evaluation of Directive 2004/48/EC and the ruling of the Court of Justice in case C-440/05 which would give guidance on the question of Community competence in adopting criminal law measures.
- The discussions on the substantive provisions of the instrument should be based on a scope of the instrument limited to the intellectual property rights harmonised in Community legislation, in line also with the principles included in the conclusions of the informal meeting in Vienna on 13/14 January 2006."

2) State of play in the European Parliament

On 25 April 2007 the European Parliament (EP) passed a legislative resolution on the amended-Commission proposal³, and adopted it, subject to a large number of amendments.

The amendments refer, *inter alia*, to the following recitals and provisions:

- i. Punishable offences to be restricted to piracy and counterfeiting, where committed on a commercial scale (1st recital, first paragraph of Article 1);
- ii. Scope of the Directive to be restricted to the infringement of intellectual property rights harmonised in Community legislation, i.e. excluding patent rights, utility models and plant variety rights (5th recital, 2nd and 4th paragraphs of Article 1);
- iii. Definition of the term "intentional infringements of an intellectual property right" to mean "any deliberate and conscious infringement of the right concerned for the purpose of obtaining an economic advantage on a commercial scale" (Article 2(c));

¹ Finnish Presidency.

² German Presidency.

³ See above footnote 1.

- iv. Reference to Article 3(5) of the Directive on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing to define "serious" (Articles 5(1) and 6);
- v. Restriction on the involvement of injured holders of property rights in joint investigation teams (10th recital, Article 9(2) and (3));
- vi. Definition of "infringements on a commercial scale" to mean "any infringement of an intellectual property right committed to obtain a commercial advantage" (Article 2(b), first clause).
- vii. Removal of the requirement that attempt should be punishable (first paragraph of Article 3).

3) Reactions by the delegations

Delegations, expressing largely provisional positions, welcomed the amendments made by the European Parliament in particular with regard to the inclusion of definitions, the exclusion from the scope of the Directive of patent rights and the restriction of the scope of the Directive to include only Community legislation.

The **Commission representative** indicated that the Commission could accept the exclusion from the scope of the Directive of the patent rights but could not accept that the scope would include only Community law; the inclusion of definitions was not acceptable either.

Delegations, reminding the Working Party that the Justice and Home Affairs Council in October had taken position with regard to the restriction of the scope of the Directive to Community law, deplored the fact that the discussions did not focus, as a priority, on the necessity for achieving a harmonisation of the legislation in this sector.

In this respect, Member States underlined that their doubts with regard to the necessity for harmonisation in this sector were to a large extent, due to the lack of a pertinent and up-dated study of the Commission on the situation of the Intellectual property legislation in the Member States. It was stressed that existing data for the situation of the protection of Intellectual Property rights in the Member States should be further assessed on the basis of a questionnaire referring to the still outstanding issues with regard to the content of the instrument such as the legal basis, the definition of offences, the penalties etc.

Furthermore, the Commission was requested to proceed to a synthesis of the state of play on the measures taken against infringements of intellectual property rights, on the basis of studies elaborated by international organisations. Finally, the Commission was asked to provide a list of Community legislation for the protection of Intellectual property rights, infringement of which would result to an offence, along the lines of the similar list provided by the Commission with regard to the environment instrument.

Closing discussions, the **Chair** indicated that examination of this instrument will continue in the light of the studies which will be provided by the Commission later on.

b) Proposal for a Council Regulation setting up a Community regime for the control of exports of dual use items and technology.

- Opinion of the Working Party on Substantive Criminal Law on the measures provided for in Article 15 (2) and article 21, fourth sentence, concerning the criminal law of the Member States.

The **Working Party on Substantive Criminal Law** continued examination of the draft opinion on the above mentioned Articles, on the basis on document 9195/1/07 REV 1. The text of the opinion, as it emerged from the discussions in the Working Party is set out in document 10915/07 DROIPEN 50 COMER 98 PESC 791 CONOP 55 ECO 90 UD 66 ATO 92. The **Chair** indicated that the draft opinion will be submitted to the consideration of Article 36 Committee.

c) "Violent Video Games"

In November 2006, following a debate in Italy, related to a particularly violent video game called "The Rule of Rose", Vice-President Frattini sent a letter to the Ministers of the Member States to raise the issue.

The Informal Justice and Home Affairs Council on 14-16 January 2007, supported the intention of the Presidency to launch a debate on the production and distribution of violent video and computer games to explore solutions with producers and distributors.

On 7 March 2007, the German Presidency launched a questionnaire (9651/07 DROIPEN 41) in order to obtain an overview of legal provisions for possible (criminal) sanctions as well as legal provisions for protecting minors from obtaining access to violent video games. Most of the Member States have replied to the questionnaire.

The Working Party on Substantive Criminal Law examined a draft for Council conclusion on this subject on the basis of document 10109/07 DROIPEN 51. The text of the Council conclusions as it emerged from the discussions in the Working Party is set out in document 10109/1/07 REV 1 DROIPEN 51. The **Chair** indicated that the draft Council conclusions will be submitted to COREPER and the Justice and Home Affairs Council in June, for adoption.

d) Procedure for the future handling of legislative files containing proposals of the first pillar, relevant to the development of criminal law policy.

- Report by the Presidency

The Working Party on Substantive Criminal Law examined the report of the Presidency on the experiences gained on this item and discussed the Council conclusions included there in , on the basis of document 10105/07 JAI 268 ENV 295 MI 144 PI 25 TRANS 192 MIGR 46 ECOFIN 238 DROIPEN 52. The text of the report and the Council conclusions ,as it emerged from the discussions in the Working Party is set out in document 10105/1/07 REV 1 JAI 268 DROIPEN 52 ENV 295 MI 144 PI 25 TRANS 192 MIGR 46 ECOFIN 238. The **Chair** indicated that the report together with the Council conclusions will be submitted to the consideration of COREPER and to the Justice and Home Affairs Council in June, for adoption.

III. CONCLUSIONS

Closing discussions, the Chair indicated that this meeting was the last under German Presidency and invited the next Portuguese Presidency to present its working programme. The Portuguese Presidency representative indicated that the Working Party will continue with the examination of the instrument on the environment and as soon as the information requested from the Commission on the intellectual property instrument will be available, the Working Party will also continue its examination.