



**COUNCIL OF
THE EUROPEAN UNION**

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NOTE

From: Presidency
To: Council

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Subject: Proposal for a Regulation of the European Parliament and of the Council on entrusting the Office for Harmonisation in the Internal Market (Trade Marks and Designs) with certain tasks related to the protection of intellectual property rights, including the assembling of public and private sector representatives as a European Observatory on Counterfeiting and Piracy
- Information from the Presidency on the progress made

1. The Commission proposal regarding the above-mentioned Regulation was submitted on 26 May 2011. It aims at entrusting enforcement-related tasks currently carried out by the European Observatory on Counterfeiting and Piracy (hereinafter referred to as "Observatory") to the Office for Harmonisation in the Internal Market (Trade Marks and Designs).

2. The Working Party on Intellectual Property (Enforcement) has met on several occasions to examine the Commission proposal and the various subsequent Presidency compromise proposals. As a result of these discussions, on 15 November 2011 the Permanent Representatives Committee (Part 1) endorsed unanimously the Presidency compromise proposal contained in the Annex to this Note and mandated the Presidency to defend this text on behalf of the Council at the forthcoming first informal trilogue, scheduled for 5 December 2011.

3. Some delegations requested a statement to be included in the future Council minutes, confirming that the Regulation cannot be interpreted as including or conferring any powers or obligations which fall under Title V of the Treaty on the Functioning of the European Union (Area of Freedom, Security and Justice). While the principle of a statement had been agreed upon, the exact wording is still to be elaborated.

4. **The Council is invited to take note of the present progress report.**

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REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on entrusting the Office for Harmonisation in the Internal Market (Trade Marks and Designs) with tasks related to the enforcement of intellectual property rights, including the assembling of public and private sector representatives as a European Observatory on Counterfeiting and Piracy

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 and 118(1) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national Parliaments,

Having regard to the opinion of the European Economic and Social Committee¹,

Acting in accordance with the ordinary legislative procedure,

Whereas:

¹ OJ C , , p. .

- (1) The economic well-being of the European Union (hereinafter referred to as "the Union") relies on sustained creativity and innovation. Therefore measures for their effective protection are indispensable in ensuring its future prosperity.
- (2) Intellectual property rights are vital business assets that help to ensure that innovators and creators get a fair return for their work and that their investment in research and new ideas is protected.
- (3) A sound, harmonised and progressive approach to intellectual property rights is fundamental in the endeavour to fulfil the ambitions of the Europe 2020 Strategy¹.
- (4) The constant rise of infringements of intellectual property rights constitutes a genuine threat not only to the Union economy, but also to the health and safety of Union consumers. Therefore, effective, immediate and coordinated actions at national, European and global levels are needed to successfully combat this phenomenon.
- (5) In the context of the overall intellectual property rights strategy foreseen by the Council Resolution of 25 September 2008 on a comprehensive European anti-counterfeiting and anti-piracy plan², the Council called on the Commission to launch a European Observatory on Counterfeiting and Piracy (hereinafter referred to as "the Observatory"). The Commission therefore formed a network of experts from the public and the private sectors and described its tasks in the Communication "Enhancing the enforcement of intellectual property rights in the internal market"³.

¹ Communication from the Commission of 3 March 2010: 'Europe 2020: A strategy for smart, sustainable and inclusive growth' - COM(2010) 2020.

² OJ C 253, 4.10.2008, p. 1.

³ COM(2009) 467, 14.9.2009.

- (6) The Communication set out that the Observatory should become the central resource for gathering, monitoring and reporting information and data related to all intellectual property rights infringements. It should be used as a platform for cooperation between representatives from national authorities and stakeholders to exchange ideas and expertise on best practices and to make recommendations for joint enforcement strategies to policy-makers. The Communication specified that the Observatory would be hosted and managed by the services of the Commission.
- (7) In its Resolution on the enforcement of intellectual property rights in the internal market of 1 March 2010, the Council invited the Commission, the Member States and industry to provide the Observatory with available reliable and comparable data on counterfeiting and piracy and to jointly develop and agree, in the context of the Observatory, on plans to collect further information. The Council also invited the Observatory to publish each year a comprehensive annual report covering the scope, scale and principal characteristics of counterfeiting and piracy as well as its impact on the internal market. That annual report should be prepared with the information provided by the authorities of the Member States, the Commission and the private sector, within the limits of data protection law, on the scope, scale and principal characteristics of counterfeiting and piracy as well as its impact on the internal market.

- (7a) In the abovementioned Resolution, the Council recognised the importance of developing new competitive business models enlarging the legal offer of cultural and creative content and at the same time preventing and combating piracy as necessary means for fostering economic growth, employment and cultural diversity.
- (8) In its Conclusions of 25 May 2010¹, the Council invited the Commission to establish a legal basis for the involvement of the Office for Harmonization in the Internal Market (hereinafter referred to as 'the Office') in enforcement related activities, including the fight against counterfeiting, in particular through fostering its cooperation with the national trade mark offices and the Observatory.
- (9) Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights² provides inter alia for measures to promote cooperation, including the exchange of information, among Member States and between Member States and the Commission.
- (10) The European Parliament, in its Resolution of 22 September 2010 on enforcement of intellectual property rights in the internal market, called on the Member States and the Commission to extend the cooperation between the Office and national intellectual property offices to also include the fight against infringements of intellectual property rights.
- (11) In view of the range of tasks assigned to the Observatory, a solution is needed to ensure an adequate and sustainable infrastructure for the fulfilment of the tasks of the Observatory.

¹ Council Conclusions of 25 May 2010 on the future revision of the Trade Mark system in the European Union (OJ C 140, 29.5.2010, p. 22).

² OJ L 195, 2.6.2004, p. 16.

- (12) Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark¹ provides for administrative cooperation between the Office and the courts or authorities of the Member States, and the exchange of publications between the Office and the central industrial property offices of the Member States. On that basis, the Office has set up cooperation with national offices that are active in the field of protection of intellectual property rights. Consequently the Office already possesses, to a considerable extent, the necessary experience and expertise to provide an adequate and sustainable infrastructure in the field of the Observatory's tasks.
- (13) The Office is therefore well placed to be entrusted with carrying out those tasks.
- (14) Those tasks should relate to all intellectual property rights covered by Directive 2004/48/EC on the enforcement of intellectual property rights , since in many cases, infringing acts affect a bundle of intellectual property rights. Furthermore, data and the exchange of best practices are needed on the entire above-mentioned range of intellectual property rights, in order to obtain a complete picture of the situation and allow designing comprehensive strategies to reduce intellectual property rights infringements.
- (15) The tasks that the Office should carry out can be linked to the enforcement and reporting measures laid down by Directive 2004/48/EC. Thus, the Office should provide services to national authorities or operators which affect, in particular, the homogenous implementation of the Directive and which are likely to facilitate its application. The Office's tasks should therefore be considered as closely linked to the subject-matter of acts approximating the laws, regulations and administrative provisions of the Member States.

¹ OJ L 78, 24.3.2009, p. 1.

- (15a) The information obligations imposed by this Regulation on the Member States and on the private sector should not create unnecessary administrative burdens and should endeavour to avoid duplication as regards data already provided by Member States and private sector representatives to EU institutions under existing EU reporting requirements.
- (16) Assembled by the Office, the Observatory should become a centre of excellence on information and data related to infringements of intellectual property rights, by benefiting from the Office's expertise, experience and resources.
- (17) The Office should offer a forum that brings together public authorities and the private sector, ensuring the collection, analysis and dissemination of relevant objective, comparable and reliable data regarding the value of intellectual property rights and the infringements of those rights, identifying and promoting best practices and strategies to enforce intellectual property rights, and raising public awareness of the impacts of intellectual property rights infringements. Furthermore, the Office should fulfil additional tasks, such as to improve the understanding of the value of intellectual property rights, exchange of information on new competitive business models enlarging the legal offer of cultural and creative content, enhance the expertise of persons involved in the enforcement of intellectual property rights by appropriate training measures, increase knowledge on techniques to prevent counterfeiting, and improve cooperation with third countries and international organisations. The Commission should be associated with the activities undertaken by the Office under this Regulation.

- (17aa) The Office should thus facilitate and support the activities of national authorities, the private sector and the EU institutions related to the enforcement of intellectual property rights and in particular their activities in the fight against infringements of those rights. The exercise by the Office of its powers under this Regulation shall not result in Member States being prevented from exercising their competences. The Office's tasks and activities under this Regulation do not extend to participation in individual operations or investigations carried out by the competent authorities.
- (17a) In order to fulfil these tasks in the most efficient manner, the Office should consult and cooperate with other authorities at national, European and international levels, create synergies with the activities carried out by these authorities and avoid any duplication of measures.
- (18) With regard to representatives of the private sector, the Office should involve, when assembling the Observatory in the context of its activities, a representative selection of the economic sectors most concerned by or most experienced in the fight against infringements of intellectual property rights, in particular representatives of right holders and Internet service providers. Also, a proper representation of consumers and of small and medium sized enterprises should be ensured.
- (19) The Office should implement the tasks and activities related to the enforcement of intellectual property rights by making use of its own budgetary means.

HAVE ADOPTED THIS REGULATION

Article 1
Subject matter and scope

This Regulation entrusts the Office for Harmonization in the Internal Market (hereinafter referred to as "the Office") with tasks related to the enforcement of intellectual property rights covered by Directive 2004/48/EC on the enforcement of intellectual property rights, with the aim of facilitating and supporting the activities of national authorities, the private sector and the EU institutions in the fight against infringements of those rights, also by organising, administering and supporting the gathering of experts, authorities and stakeholders assembled under the name "European Observatory on Counterfeiting and Piracy"(hereinafter referred to as "the Observatory").

The Office's tasks and activities under this Regulation do not extend to participation in individual operations or investigations carried out by the competent authorities.

Article 2
Tasks and activities

1. The Office shall have the following tasks:
 - (a) improving the understanding on the scope and impact of infringements of intellectual property rights;
 - (b) improving the understanding of the value of intellectual property;
 - (c) enhancing knowledge on best public and private sector practices to protect intellectual property rights;

- (d) raising citizens' awareness of the impact of infringements of intellectual property rights;
 - (e) enhancing the expertise of persons involved in the enforcement of intellectual property rights;
 - (f) enhancing knowledge on technical tools to prevent and combat infringements of intellectual property rights, including tracking and tracing systems;
 - (g) providing mechanisms which help to improve the online exchange, between Member States' authorities working in the field of intellectual property rights, of information related to the enforcement of such rights, and fostering cooperation with and between these authorities;
 - (h) working, in consultation with Member States, to foster international cooperation with intellectual property offices in third countries to build strategies and developing techniques for the enforcement of intellectual property rights, skills and tools.
2. In the fulfilment of the tasks set out in paragraph 1, the Office shall carry out the following activities in accordance with the work programme adopted pursuant to Article 7, and in line with European Union law, including on data protection:
- (a) (deleted)
 - (b) establishing a methodology for the collection, analysis and reporting of independent, objective, comparable and reliable data related to infringements of intellectual property rights;

- (c) collecting, analysing and disseminating relevant objective, comparable and reliable data regarding infringements of intellectual property rights;
- (d) collecting, analysing and disseminating relevant objective, comparable and reliable data regarding the economic value of intellectual property and its contribution to economic growth, welfare, innovation, creativity, cultural diversity, the creation of high quality jobs and the development of high quality products and services within the Union;
- (e) providing regular assessments and specific reports by economic sector, geographic area and type of intellectual property right infringed, which evaluate, inter alia, the impact of intellectual property rights infringements on society, economy, health, environment, safety and security;
- (f) collecting, analysing and disseminating information regarding best practices between the representatives meeting as the Observatory, and, if applicable, making recommendations for strategies based on such practices;
- (g) drawing up reports and publications to raise awareness among the Union's citizens of the impact of infringements of intellectual property rights, and to this end, organising conferences, events and meetings at European and international levels and supporting or coordinating national and pan-European actions, including online and offline campaigns;

- (ga) monitoring the development of new competitive business models enlarging the legal offer of cultural and creative content, and encouraging the exchange of information and raising consumer awareness in this respect;
- (h) developing and organising on-line and other forms of training for national officials involved in the protection of intellectual property rights;
- (i) organising ad hoc meetings of experts to support its work under this Regulation;
- (j) identifying and promoting technical tools for professionals and benchmark techniques, including tracking and tracing systems which help to distinguish genuine from counterfeit products;
- (k) working with national authorities and the Commission to develop an on-line network to facilitate the exchange of information between public administrations, bodies and organisations in the Member States dealing with the protection and enforcement of intellectual property rights, related to infringements of such rights;
- (l) working in cooperation with, and building synergies between the central industrial property offices of the Member States, including the Benelux Office for Intellectual Property and other Member States' authorities working in the field of intellectual property rights, to develop and promote techniques, skills and tools related to the enforcement of intellectual property rights, including training programmes and awareness campaigns;

- (m) developing, in consultation with the Member States, programmes on technical assistance for third countries as well as developing and delivering specific training programmes and events for officials from third countries involved in the protection of intellectual property rights;
- (n) making recommendations to the Commission on issues falling within the scope of this Regulation, on the basis of a request from the Commission;
- (o) (deleted)

*Article 3
Financing*

The Office shall at all times ensure that the activities entrusted to it by this Regulation are carried out by making use of its own budgetary means.

*Article 4
Meetings of the Observatory*

1. In order to carry out the activities referred to in Article 2(2), the Office shall invite to meetings of the Observatory, at least once per year, representatives from public administrations, bodies and organisations in the Member States dealing with intellectual property rights and representatives from the private sector, for the purpose of participating in the Office's work under this Regulation.

2. Representatives meeting as the Observatory invited from the private sector shall include a broad, balanced and representative range of Union and national bodies representing the different economic sectors most concerned by or most experienced in the fight against infringements of intellectual property rights.

Consumer organisations and small and medium sized enterprises shall be properly represented amongst these bodies.

3. The Office shall invite each Member State to send at least one representative from its public administration to meetings of the Observatory. In this context, Member States shall ensure continuity in the Observatory's work.
4. (deleted)
5. The meetings referred to in paragraph 1 may be complemented by working groups within the Observatory made up of representatives from Member States and representatives from the private sector.
- 5a. When appropriate, and in addition to the meetings referred to in paragraph 1, the Office shall organise meetings consisting of:
 - a) representatives from the public administrations, bodies and organizations in the Member States, or
 - b) private sector representatives.

6. Members or other representatives of the European Parliament and representatives from the Commission shall be invited to any of the meetings covered by this Article, either as participants or observers, as appropriate.
7. The names of the representatives, the agenda and the minutes of these meetings shall be published on the Office's website.

Article 5
Information obligations

1. As appropriate, without prejudice to the law governing the processing of personal data and unless there are public interest reasons for not doing so, Member States shall, at the request of the Office or on their own initiative:
 - (a) inform the Office of their overall policies and strategies on the enforcement of intellectual property rights and any changes thereto;
 - (b) provide available statistical data on infringements of intellectual property rights;
 - (c) inform the Office of important case law.

2. Without prejudice to the law governing the processing of personal data and to the protection of confidential information, private sector representatives meeting as the Observatory shall, when possible, at the request of the Office:
 - (a) inform the Office of policies and strategies in their field of activity on the enforcement of intellectual property rights and any changes thereto;
 - (b) provide statistical data on infringements of intellectual property rights in their field of activity.

Article 6
Office

1. Title XII of Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark shall apply to the implementation of the tasks and activities provided for under this Regulation.
2. Using the powers conferred on it by Article 124 of Regulation (EC) No 207/2009, the President of the Office shall adopt the internal administrative instructions and shall publish the notices that are necessary for the fulfilment of all the tasks entrusted to the Office in this Regulation.

Article 7
Content of the work programme and of the management report

01. The Office shall draw up an annual work programme that prioritises the activities appropriately under this Regulation and for the meetings of the Observatory, in line with the Union's policies and priorities in the field of protection of intellectual property rights and in cooperation with the Observatory representatives referred to in Article 4(5a) point (a).

The work programme referred to in paragraph 01 shall be submitted to the Office's Administrative Board for information.

1. The management report foreseen in point (d) of Article 124(2) of Regulation (EC) No 207/2009 shall contain at least the following information on the Office's tasks and activities under this Regulation:
- a. a review of the main activities carried out during the preceding calendar year;
 - b. the results achieved during the preceding calendar year, accompanied, where appropriate, by sectoral reports analysing the situation in the different industry and product sectors;
 - c. an overall assessment of the fulfilment of the Office's tasks as provided for in this Regulation and in the work programme drawn up in accordance with paragraph 01;

- d. an overview of the activities that the Office intends to undertake in the future;
- e. observations on the enforcement of intellectual property rights and potential future policies and strategies, including on how to enhance an effective cooperation with and between Member States.

The President shall consult the Observatory representatives referred to in Article 4(5a) point (a) on the relevant parts of the management report referred to in this paragraph before submitting the report to the Commission, the European Parliament and the Administrative Board.

Article 8
Evaluation

1. Within 5 years after entry into force of this Regulation, the Commission shall adopt a report evaluating the application of this Regulation.
2. The evaluation report shall assess the operation of this Regulation, in particular as regards its impact on the enforcement of intellectual property rights in the internal market.
3. The Commission shall, when preparing the evaluation report, consult the Office, the Member States and the representatives meeting as the Observatory on the issues set out in paragraph 2.

4. The Commission shall transmit the evaluation report to the European Parliament, the Council and the European Economic and Social Committee and undertake a broad consultation among stakeholders on the evaluation report.

Article 9
Entry into force

This Regulation shall enter into force on the [twentieth] day following that of its publication in the Official Journal of the European Union.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the European Parliament
The President

For the Council
The President
