CONTRIBUTION BY THE LEGAL SERVICE

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Subject: Proposal for a Directive of the European Parliament and of the Council on measures and procedures to ensure the enforcement of intellectual property rights

- Doc. 5802/04 PI 10 CODEC 126 of 29 January 2004

1. At its meeting on 5 and 6 February 2004, the Working Party on Intellectual Property asked the Legal Service to comment on Article 8 and the legal basis of the above draft Directive. At the Working Party's request, the Legal Service's comments are set out and developed in writing below.

2. The representative of the Legal Service explained that Article 8 (1) of the draft Directive provides that Member States shall ensure that judicial authorities may order provisional measures, such as the physical seizure of infringing goods, if a party has presented reasonable available evidence to support its claims that its intellectual property right has been infringed or is about to be infringed. However, the condition of presenting reasonable available evidence does not prevent a Member State from maintaining a national rule whereby provisional measures to preserve evidence may be ordered at the mere request of the right holder. This follows from the general scope of the draft Directive as being a minimal harmonisation, and in particular Article 2 (1) which provides that it is without prejudice to means provided for in national legislation, insofar as those means may be more favorable for right holders.
3. As regards the legal basis, the Legal Service considers that the principal objective of the draft Directive is to eliminate disparities between the systems of the Member States for enforcing intellectual property rights in order to ensure the functioning of the internal market. The draft Directive does not establish harmonised rules eliminating cross-border obstacles to the good functioning of civil proceedings in general, nor does it establish any other harmonised rules for judicial cooperation in civil matters having cross-border implications, for example on jurisdiction, the recognition and enforcement of decisions in civil and commercial matters and applicable law. The draft Directive harmonises measures and procedures insofar as necessary to ensure that intellectual property rights enjoy an equivalent level of protection within the Community. As an internal market measure, it is validly and sufficiently based on Article 95 EC even though it contains several provisions relating to civil and procedural law within a specific area. This conclusion is in accordance with the Council's legislative practice in other sectors.

1 On the application of Article 65 EC, see Opinion of the Legal Service, Doc. 7862/02 of 17.04.02.