Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on measures and procedures to ensure the enforcement of intellectual property rights

(presented by the Commission)
EXPLANATORY MEMORANDUM

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INTRODUCTION

A. Objective of the Community initiative

Counterfeiting and piracy, and infringements of intellectual property in general, are a constantly growing phenomenon which nowadays have an international dimension, since they are a serious threat to national economies and governments. In the European Internal Market, this phenomenon takes particular advantage of the national disparities in the means of enforcing intellectual property rights. These disparities seem to influence the choice of where counterfeiting and piracy activities within the Community are carried out, and this means that the counterfeited and pirated products are more likely to be manufactured and sold in those countries which are less effective than others in combating counterfeiting and piracy. They therefore have direct repercussions on trade between the Member States and a direct impact on the conditions governing competition in the Internal Market. This situation leads to diversions of trade, distorts competition and creates disturbances on the market.

The disparities between the national systems of penalties, apart from hampering the proper functioning of the Internal Market, make it difficult to combat counterfeiting and piracy effectively. This leads to a loss in confidence in economic circles in the Internal Market, and hence to a reduction in investment. In addition to the resultant economic and social consequences, counterfeiting and piracy also pose problems for consumer protection, particularly when public health and safety are at stake. Increasing use of the Internet enables pirated products to be distributed instantly around the globe. Finally, this phenomenon appears to be increasingly linked to organised crime. Combating the phenomenon is thus of vital importance for the Community especially when these illegal activities are carried out on for commercial purposes or cause significant harm to the right holder.

The aim of this Directive is to tackle this situation by harmonising national legislation on the enforcement of intellectual property rights.

B. Basis for the initiative: consultation by the Commission

On 15 October 1998, the Commission presented a Green Paper on the fight against counterfeiting and piracy in the Single Market\(^1\) in order to launch a debate on this subject with all interested parties. The areas of intervention suggested in the Green Paper related in particular to action by the private sector, the effectiveness of technical security provisions, penalties and other means of ensuring compliance with intellectual property rights, as well as administrative co-operation between the national authorities.

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\(^1\) COM(98) 569 final.
The Commission received a large number of contributions which became the subject of a published summary report. Together with the German Presidency of the Council of the Union, the Commission organised in Munich on 2 and 3 March 1999 a hearing open to all interested circles, as well as a meeting of experts from the Member States on 3 November 1999. The European Economic and Social Committee submitted its opinion on the Green Paper on 24 February 1999. The European Parliament adopted a Resolution on this subject on 4 May 2000.

This consultation exercise confirmed, in particular, that the disparities between the national systems of penalties for intellectual property rights were having a harmful effect on the proper functioning of the Internal Market. The interested parties expressed the desire for this question to be tackled energetically and for far-reaching measures to be taken at the level of the European Union.

Subsequent to this consultation exercise, the Commission presented on 30 November 2000 a follow-up Communication to the Green Paper containing an ambitious action plan to improve and strengthen the fight against counterfeiting and piracy in the Internal Market. Among the measures proposed in that action plan, the Commission announced that it would be presenting a proposal for a Directive aimed at harmonising the legislative, regulatory and administrative provisions of the Member States on the means of enforcing intellectual property rights, and at ensuring that the rights available enjoy an equivalent level of protection in the Internal Market. That is the aim of this proposal.

The Commission Communication, and in particular the announcement of a proposal for a Directive on the enforcement of intellectual property rights, was welcomed by interested circles. In its supplementary opinion of 30 May 2001, the European Economic and Social Committee approved the intention of the European Commission to present a proposal for a Directive on this subject in the near future.

PART ONE:

ACHIEVING THE INTERNAL MARKET IN THE FIELD OF INTELLECTUAL PROPERTY

A. Enforcing the substantive law of intellectual property

Up till now, the action taken by the Community in the field of intellectual property has focused mainly on the harmonisation of national substantive law or the creation of a unitary right at Community level. Certain national intellectual property rights, for instance, have been harmonised, such as trade marks, designs, patents for biotechnological inventions, and

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5 OJ C 41, 7.2.2001, p. 56.
7 OJ C 221, 7.8.2001, p. 20.
certain aspects of copyright and related rights\textsuperscript{11}. The recent adoption of the Directive on a resale right for the benefit of the authors of original works of art\textsuperscript{12}, and the Directive on the harmonisation of certain aspects of copyright and related rights in the information society\textsuperscript{13}, are in this respect a major step forward in the process of harmonising copyright and related rights. This last Directive will make it possible to adapt the protection of right holders to technological developments, in particular in the digital field. The Community has also intervened to extend the duration of patent protection for medicinal products and plant protection products\textsuperscript{14}, as well as to lay down common rules for geographical indications and designations of origin\textsuperscript{15}. The Commission has also made proposals for harmonisation with a view to clarifying the legal situation regarding the patentability of computer-implemented inventions\textsuperscript{16}.

The Community has also taken action to create unitary rights at Community level, immediately valid throughout the EC, such as the Community trade mark\textsuperscript{17}, the Community system of protection for plant varieties\textsuperscript{18} and, more recently, Community designs\textsuperscript{19}. It should also be noted that legislative proposals are currently under discussion at the level of the Council of the EU for the creation of a Community patent\textsuperscript{20}.


\textsuperscript{20} Proposal for a Council Regulation on the Community patent, OJ C 337 E, 28.11.2000, p. 278.
The powers of the Community in the field of the substantive law on intellectual property, which appears more and more to be a field for priority intervention for the Community in order to ensure the success of the Internal Market, are today fully recognised. It is thus a logical extension that the Community should take an interest in the effective enforcement of the intellectual property rights which it has harmonised or created at Community level. At the level of principles, the fact that the enforcement of intellectual property rights, which are today governed essentially by Community law, should be ensured according to systems which sometimes vary widely from one Member State to the other appears difficult to reconcile with the objective of guaranteeing right holders an equivalent level of protection in the Internal Market.

B. Promoting freedom of movement and ensuring fair and equal competition in the Internal Market

Article 3(1)(c) of the EC Treaty lays down that the activities of the Community include an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods and services. In addition, Article 14(2) of the EC Treaty lays down that the internal market comprises an area without internal frontiers in which the free movement of, in particular, goods and services is ensured.

While the gradual harmonisation of substantive law on intellectual property rights has promoted the free movement of goods between the Member States and has made the rules applicable more transparent, the means of enforcing intellectual property rights have not yet been subject to any harmonisation. Moreover, even when the national legislation provides right holders with effective means of enforcing their rights, it sometimes happens that the practical implementation of those means is not ensured. As pointed out by interested circles during the consultation on the Green Paper, these loopholes have naturally been exploited by counterfeiters and pirates, who have taken advantage of national differences to market their products, thereby causing diversions of trade and market disturbances. Harmonisation of the national provisions governing the enforcement of intellectual property rights will ensure better movement within the Internal Market, greater transparency in the systems of penalties and improved application of the means made available to right holders.

Furthermore, the creation of fair and equal conditions of competition between all economic operators in the field of intellectual property is essential in order to allow these operators to make effective use of the fundamental freedoms set out in the EC Treaty. The conditions for fair and equal competition are weakened or nullified by differing national rules on enforcing intellectual property rights. Under certain circumstances, the results are distortions of competition which jeopardise the free movement of goods and services in the Internal Market.

Distortions of competition in the Internal Market may come not only from differences in the scope and extent of intellectual property rights by virtue of national law, but also from differences in the systems of penalties applied to protect those rights against counterfeiters and pirates. From the point of view of the latter, the strictness of the local system of penalties can be taken into account in the production costs of illegal products. These costs will depend

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21 It took a judgment of the Court of Justice in 1995, handed down in relation to Regulation (EEC) No 1768/92 concerning the creation of a supplementary protection certificate for medicinal products, for it to be fully recognised that patents are not a field reserved for the Member States, and that the Community may adopt harmonisation measures in that field (judgment of 13.7.1995 in Spain v. Council, Case C-350/92, ECR 1995, p. I-1985).
on the penalties applied in the event of proceedings (seizure of the illegal goods, payment of fines, need to pay workers more to offset the risk of retaliation measures).

The result is that, in the absence of legislation to harmonise the systems of penalties for intellectual property rights in the Internal Market, there will continue to be a situation of differences in terms of the risks and, hence, of the costs for the operators of counterfeit and pirated products. Since such counterfeit and pirated goods are, by definition, substitutes in the economic sense for the lawfully marketed goods which they imitate, the divergences in the cost base in the Internal Market for illegal operators will also give rise to differences in the conditions of competition for the lawful operators. It can be considered that, in those parts of the Internal Market where the system of penalties is relatively ineffective, the market share for counterfeit and pirated products is likely to be higher, and the prices of both legal and illegal goods lower, than in countries which have stricter penalties for intellectual property rights.

This means that divergences in the systems of penalties are likely to lead to distortions in the conditions of competition and to diversions of the natural trade flows of legal goods which would take place if the penalties for intellectual property rights were harmonised throughout the Internal Market.

Counterfeiting and piracy are a phenomenon which spreads by exploiting the differences between national legislations. Moreover, in those countries in which this phenomenon arises, businesses have to face the competition from counterfeit and pirated products on the markets in which they are developing, which leads to losses in market share and disorganisation in their distribution networks. When the market is flooded with counterfeit and pirated products which are easier to sell than the genuine articles, retailers are sometimes loath to order the genuine articles. They may even be tempted to sell copies, if necessary alongside genuine articles. This situation is not such as to ensure the transparency and equality of the conditions of competition in the Internal Market. Only the harmonisation of national legislation will be able to eliminate distortions of competition arising from this phenomenon.

Having said that, in sectors in which competition is particularly fierce, such as the market for spare car parts, the fight against counterfeiting and piracy must not be used to try to keep unwelcome competitors out of the market or to hamper legitimate competition. Such action would risk not only causing serious damage to the businesses concerned, but also - and above all - doing a disservice to the objective pursued, which is to prevent the marketing of products which infringe intellectual property rights and in many cases involve risks to the health or safety of consumers.

C. **Supplementing the measures at the external frontier and vis-à-vis third countries**

This proposal for a Directive is also intended to supplement, for the needs of the Internal Market, the measures already taken on the basis of Regulation (EC) No 3295/94, as amended, on checks for counterfeit and pirated products at the external frontier of the EU. These rules apply only to movements of suspected counterfeit and pirated goods between third countries and the Community. They do not enable the monitoring of movements within

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the Community. Moreover, given that the checks at the frontier are carried out by all Member States on the basis of a selective approach in order to maintain a fair balance between the free flow of international trade and the fight against fraud, it cannot be excluded that counterfeit or pirated products may enter the territory of the Community illegally to be subsequently marketed there. There is therefore a need for a means of fighting counterfeiting and piracy specific to the requirements of the Internal Market. This Directive will thus provide right holders with a number of measures and procedures for enforcing their rights against all illegal goods, including those intercepted by customs authorities under Regulation (EC) No 3295/94, as amended.

Another objective of the Directive is to supplement the measures taken to combat counterfeiting and piracy in the context of the Community's relations with third countries and the multilateral agreements to which it is party. This applies, in particular, to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), concluded in the framework of the World Trade Organisation, to which all the Member States of the European Union are parties, as well as the Community as regards matters within its competence, and which lays down minimum provisions as regards the means of enforcing intellectual property rights.

PART TWO:
MEETING THE NEEDS OF A MODERN ECONOMY AND PROTECTING SOCIETY

While the principal objective of this measure is to achieve the Internal Market in the field of intellectual property by ensuring that the *acquis communautaire* in the substantive law of intellectual property is applied correctly in the European Union, other major objectives are worthy of emphasis.

A. Promoting innovation and business competitiveness

Innovation has become one of the most important vectors of sustainable growth for businesses, and of economic prosperity for society as a whole. Businesses must constantly improve or renew their products if they wish to keep or capture market shares. Sustained inventive and innovatory activity, leading to the development of new products or services, puts businesses at an advantage in technological terms and is a major factor in their competitiveness.

If businesses, universities, research organisations and the cultural sector are to be able to innovate and be creative under good conditions, it should be ensured that creators, researchers and inventors in the Community benefit from an environment favourable to the development of their activities, including as regards the new information and communication technologies. In this context, the free movement of information should also be ensured and access to the Internet not made more difficult or costly by, for instance, imposing excessively heavy obligations on Internet intermediaries.

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25 In its Opinion 1/94 of 15 November 1994, the Court of Justice declared that the competence for concluding the TRIPS Agreements was shared between the Community and its Member States (ECR 1994, p. I-5267).
26 Title XVIII of the EC Treaty stresses the importance of research and technological development.
27 The importance of the cultural sector is explicitly highlighted in Article 151(4) of the EC Treaty.
Businesses, which often invest large amounts of money in research and development, marketing and publicity, must be in a position to recoup their investments. Appropriate and effective protection of intellectual property helps to establish the confidence of businesses, inventors and creators in the Internal Market and is a powerful incentive for investment, and hence for economic progress.

The phenomenon of counterfeiting and piracy leads to businesses losing turnover and market shares (loss of direct sales) which they have sometimes had difficulty acquiring, not to mention the intangible losses and the moral prejudice they suffer because of the loss in terms of brand image with their customers (loss of future sales). The spread of counterfeited and pirated products in fact leads to a prejudicial downgrading of the reputation and originality of the genuine products particularly when businesses gear their publicity to the quality and rarity of their products. This phenomenon also involves additional costs for businesses (costs of protection, investigations, expert opinions and disputes) and in certain cases may even lead to tort actions against the de facto right holder of the products marketed by the counterfeiter or pirate where the proof of good faith cannot be brought.

In the light of the responses which the Commission received to its Green Paper on the fight against counterfeiting and piracy in the Internal Market, it transpires that, within the European Union, counterfeited and pirated goods account for 5 to 10% of vehicle spare parts sales, 10% of sales of CDs and MCs, 16% of film (video and DVD) sales and 22% of those of shoes and clothing.28

According to a survey carried out in France in 1998 by KPMG, Sofres and the Union des Fabricants, the average loss to the businesses which replied to the survey, and which were able to estimate the turnover lost through counterfeiting, was put at 6.4% of turnover. A study carried out in June 2000 by the Centre for Economics and Business Research (CEBR) on behalf of the Global Anti-Counterfeiting Group (GACG) shows that the average annual reduction in profits in the sectors considered is considerable: EUR 1266 million in the clothing and footwear sector; EUR 555 million in the perfumes and cosmetics sector; EUR 627 million in the toys and sports articles sector; EUR 292 million in the pharmaceuticals sector. In the field of software, a study carried out by the International Planning and Research Corporation (IPR), on behalf of the Business Software Alliance (BSA), showed that, in western Europe (EU + Norway + Switzerland), the losses due to piracy in 2000 amounted to more than USD 3 billion.

If counterfeiting and piracy are not punished effectively, they lead to a loss of confidence amongst operators in the Internal Market as an area for developing their activities and protecting their rights. The effect of this situation is to discourage creators and inventors and to endanger innovation and creativity in the Community.

B. Promoting the preservation and development of the cultural sector

Intellectual property rights hold particular relevance for the cultural sector, especially in the audiovisual sphere. A lack of adequate protection would not only severely trammel the development of a major economic sector but would, above all, pose a threat to our heritage and cultural diversity.

31 Sixth Annual BSA Global Software.
What marks this sector out from others is the fact that it constitutes a key element of our society, so that it is essential not only to preserve it but especially to promote its development. Yet it is particularly under threat from piracy. The cultural sphere (including the music publishing and audiovisual sectors) puts its losses through counterfeiting and piracy at more than 4.5 billion euro annually. On the audiovisual side, for example, piracy of works that meet with a certain degree of success not only deprives the authors of their rights but also makes it impossible to maintain plurality. This applies in particular to works published in a limited quantity, often stemming from the cultures of smaller Member States where there are no economies of scale. Moreover, the replacement of analogue by digital media has considerably exacerbated the problem.

C. Preserving employment in Europe

In social terms, the damage suffered by businesses because of counterfeiting and piracy is reflected ultimately in the volume of employment they offer. However, the effect of counterfeiting and piracy on employment in industry is difficult to measure precisely. According to the study carried out in June 2000 by the CEBR on behalf of the GACG, more than 17 000 jobs were said to have been lost per year in the European Union because of counterfeiting and piracy activities. According to the survey carried out in France in 1998 by KPMG, Sofres and the Union des Fabricants, the number of jobs lost in France through counterfeiting is about 38 000. In a study carried out in the United Kingdom in 1999 by CEBR for the Anti-Counterfeiting Group (ACG), a British association for combating counterfeiting, the number of jobs lost each year in that country is said to be more than 4 000. Finally, according to a study undertaken in 1998 by PricewaterhouseCoopers on behalf of the BSA, a 10% reduction in the pirating of software, i.e. to the level in the United States, would create more than 250 000 jobs in Europe by 2001.

D. Preventing tax losses and market destabilisation

Counterfeiting and piracy also do a great deal of damage to national economies and particularly those of the industrialised countries. This phenomenon results in a loss of revenue for the government or for the Community (customs duties, VAT) and may give rise to multiple infringements of, for instance, labour legislation when the counterfeit or pirated products are manufactured in clandestine workshops by unregistered workers or sold on the street by clandestine workers.

Tax losses caused by counterfeiting and piracy are considerable. In the phonographic sector, for example, VAT losses incurred by EU governments as a result of counterfeiting and piracy are said to amount to EUR 100 million. The study conducted in June 2000 by the CEBR on behalf of the GACG shows that counterfeiting in the EU leads to a high average loss of tax revenue in the sectors considered: EUR 7 581 million in the clothing and footwear sector; EUR 3 017 million in the perfumes and cosmetics sector; EUR 3 731 million in the toys and sports articles sector; EUR 1 554 million in the pharmaceuticals sector. According to the

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32 Cf. footnote 30.
33 Cf. footnote 29.
37 Cf. footnote 30.
survey carried out in the United Kingdom in 1999 by the CEBR on behalf of the ACG, counterfeiting was said to lead to a reduction in GNP of GBP 143 million per year and to a GBP 77 million increase in government borrowing.

This phenomenon is a genuine threat to the economic equilibrium of society since it can also lead to a destabilisation of the — sometimes very fragile — markets, such as that of textile products, which it attacks. In the multimedia products industry, counterfeiting and piracy via the Internet are steadily increasing and, despite the relatively recent development of the web, already represent considerable losses.

E. Ensuring consumer protection

Consumer protection is a major concern in Europe. Striving for a high level of consumer protection, particularly as regards their health and safety, is an essential element of Community action. Counterfeiting and piracy, and infringements of intellectual property in general, frequently have pernicious consequences for consumers.

Although this phenomenon has sometimes developed with the complicity of the consumer, it comes about mostly against his will and in any event is always to his disadvantage. Counterfeiting and piracy are generally accompanied by deliberate cheating of the consumer as to the quality he is entitled to expect from a product bearing, for instance, a famous brand name, since counterfeit or pirated products are produced without the checks made by the competent authorities and do not comply with the minimum quality standards. When he buys counterfeit or pirated products, the consumer does not in principle benefit from a guarantee, after-sales service or effective remedy in the event of damage. Apart from these drawbacks, the phenomenon may pose a real threat to the health of the consumer (counterfeit medicines, adulterated alcohol) or to his safety (counterfeit toys or parts for cars or aircraft).

Harmonisation of national legislation on the means of enforcing intellectual property rights will contribute to consumer protection and will be a useful addition to the existing legislative arsenal in the this field at Community level, and in particular the European directives on product liability and general product safety.

F. Ensuring the maintenance of public order

Counterfeiting and piracy are a genuine threat to public order. Apart from the economic and social consequences, this phenomenon infringes labour legislation (clandestine labour), tax legislation (loss of government revenue), health legislation and the legislation on product safety. Moreover, it has already been established that counterfeiting and piracy are activities

38 Cf. footnote 34.
39 In the context of the WTO agreement on textiles and clothing (ATC), a process of gradual liberalisation was set in motion which will lead to the abolition of quantitative restrictions between WTO members by 1 January 2005.
40 Other examples were cited in the consultation: defective medical material, detergents with caustic substances, adulterated antibiotics, carcinogenic substances in clothing, low-quality motor oil, toxic alcoholic beverages, defective household electric goods, ineffective anti-rabies vaccines, defective filters for diesel engines, etc.
which to a certain extent go hand-in-hand with organised crime, which finds in these activities a low-risk means of recycling and laundering earnings from other illicit trafficking (arms, drugs). Counterfeiting and piracy, which were once craft activities, have become almost industrial-scale activities. They offer criminals the prospect of large economic profit without excessive risk. In the context of the Internet, the rapidity of illegal operations and the difficulty of tracking the operations further reduce the risks for the criminal. Counterfeiting and piracy carried out on a commercial scale are even said to have become more attractive nowadays than drug trafficking, since high potential profits can be obtained without the risk of major legal penalties. Counterfeiting and piracy thus appear to be a factor in promoting crime, including terrorism. For the rest, the consultation of interested circles launched with the 1998 Green Paper confirmed, with the support of examples in the field of music and software, the links between counterfeiting and piracy and organised crime.

Harmonisation at Community level of the means of enforcing intellectual property rights will therefore help Member States preserve public order.

Strengthening and improving the fight against counterfeiting and piracy in the Internal Market stand alongside the horizontal measures taken in the field of justice and internal affairs, and in particular the strategy of the European Union aimed at preventing and monitoring crime in line with the provisions of the Treaty of Amsterdam, the conclusions of the Tampere European Council of 15 and 16 October 1999, and the measures proposed by the Commission in its Communication on the prevention of crime and the work of the European Forum for the prevention of organised and economic crime. Finally, this initiative is in line with the Commission's overall strategic approach to combating fraud and the measures taken to protect Community interests.

PART THREE:

DETAILS AND CHARACTERISTICS OF THE MEASURES PROPOSED

A. The limits of the TRIPS Agreement

The measures and procedures for enforcing intellectual property rights were the subject of de facto harmonisation with the entry into force of the TRIPS Agreement, which lays down minimum provisions for the means of enforcing trade-related intellectual property rights. These means comprise:

- the general obligation to put in place effective measures for enforcing intellectual property rights, including measures for provisional protection and remedies which have a deterrent effect;
- fundamental aspects of civil and administrative procedure: fair and equitable procedures, rules applicable to the production of evidence;

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44 The European Forum for the prevention of organised and economic crime is a Commission initiative aimed at organising work on crime prevention at European level. It is a framework for networking experts and launching initiatives.
– the establishment of certain civil (or administrative) remedies such as injunctions, damages, seizure and destruction of infringing goods and, on an optional basis, the right of information;

– minimum requirements to be met by the provisional measures for the protection of intellectual property rights;

– the implementation of criminal procedures and criminal sanctions in certain cases.

However, certain means of enforcing rights are not provided for in the TRIPS Agreement (for example, recall, at the counterfeiter's expense, of counterfeited goods placed on the market), while others are provided for only on an optional basis (for example, right of information). Finally, the rules for applying the measures and procedures laid down by the TRIPS Agreement may thus vary considerably from one country to another. In the Community, this is the case with the rules for applying provisional measures, which are used in particular for safeguarding evidence, the calculation of damages and with the rules for applying the procedures when the counterfeiting or piracy activities have ceased.

B. The acquis communautaire with regard to the enforcement of intellectual property rights

At Community level, the measures to enforce intellectual property rights have focused above all on protecting the external frontier of the Community.\(^{46}\) As regards the Internal Market, some sectoral instruments contain specific provisions on enforcing intellectual property rights.\(^{47}\) However, no detailed horizontal instrument has yet been adopted at Community level in this field.

C. The legal situation in the Member States

Despite the implementation of the TRIPS Agreement, the legal situation in the Community shows major disparities which do not allow the holders of intellectual property rights to benefit from an equivalent level of protection throughout the Community. For instance, the procedures for stopping counterfeiting or piracy activities (injunctions), the provisional measures used in particular to safeguard evidence, the calculation of damages and the level of civil and criminal penalties vary widely from one Member State to another. In certain Member States, measures and procedures such as the right of information and the recall, at the counterfeiter's expense, of the counterfeited goods placed on the market are not available.

With regard to injunctions, there are differences in the rules of application, for example in the account taken of the interests of third parties, the different methods of eliminating the counterfeit goods, or the conditions under which the removal of equipment used to manufacture the counterfeit goods may be ordered. In Greece, in principle, the penalty does

\(^{46}\) Cf. footnote 19.

\(^{47}\) For example, in the field of copyright: Article 7 (special measures of protection) of Directive 91/250/EEC on the legal protection of computer programs (cf. footnote 11); Article 12 (remedies) of Directive 96/9/EC on the legal protection of databases (cf. footnote 11); Articles 6 (technological measures), 7 (rights-management information) and 8 (sanctions and remedies) of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (cf. footnote 13). In the field of industrial property: Articles 98 (sanctions) and 99 (provisional and protective measures) of Regulation No 40/94 on the Community trade mark; Articles 89 (sanctions in actions for infringement) and 90 (provisional and protective measures) of Regulation No 6/2002 on Community designs.
not necessarily imply guilt and can thus be imposed on a bona fide infringer. In Sweden and Finland, the penalty does not apply to a person acting in good faith, whereas in Denmark, Spain and Italy the penalty does not apply to a person who makes only private use of the goods in question. In the Netherlands (copyright), seizure and destruction are not ordered if the person was not himself involved in the infringement, is not professionally concerned with the articles in question and acquired them purely for personal purposes. In the United Kingdom, the instruments used for the manufacture of pirated copies can be destroyed only if the person holding them knew or had reason to know that they were to be used for that purpose. In Germany (copyright), the instruments used (exclusively or almost exclusively) to produce the pirated copies can be seized and destroyed only if they are the property of the pirate, whereas there is no corresponding restriction in the case of trade marks. In the Netherlands, judicial practice has established the principle that the infringer may be obliged to recall the counterfeit products already distributed on the market. The infringer must bear the costs of that operation and pay compensation to the purchaser. This type of measure does not exist in the law of the other Member States.

With regard to evidence, the measure known in the United Kingdom as the Anton Piller order is very important in practice, but is regarded by many as too burdensome and complicated. On an order from the High Court, and without the other party being heard, it allows for the inspection and global seizure of the evidence on the premises of the presumed infringer. The so-called Doorstep order (simplified Anton Piller order), by which requests for documents and objects may be presented without the right to enter premises, is considered effective. Another measure, known as a freezing injunction (or Mareva injunction) is used to block the bank accounts and other assets of the defendant pending the examination of the substance of the case by the Court. In France, the law also provides a highly effective tool for obtaining evidence. The right holder may submit a request for seizure for counterfeiting to the President of the Tribunal de grande instance (Regional Court). The measure may take the form of a detailed descriptive record or the physical seizure of the products in question. In Italy, the seizure and description of the articles in question are also provided for by law. In Germany, the legal possibilities for acquiring evidence are not very strong. They are limited to obtaining evidence from the statements of witnesses, from the evidence of experts and inspections, and do not extend to documents and the hearing of the parties. Unlike the other Member States, search warrants issued without the other party being heard are not available in civil procedure in Austria, Denmark and Sweden.

In the case of the provisional measures, there are major differences in the rules of the procedure and the frequency with which these remedies are used, although these differences are essentially the result of the traditions and approaches adopted by the courts. In the Netherlands, the simplified procedure of kort geding is very often used and is even regarded as having to a certain extent replaced the ordinary procedures in the event of an infringement of intellectual property rights. In the United Kingdom, preliminary injunctions are fairly frequent in practice, the deciding factor in evaluating the injunction being the ability of the

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48 HR 23.2.1990, NJ 1990, 464m. nt. DWFV (Hameco) and following decisions.
51 Art. 25(1) of the British rules of civil procedure.
53 Articles L-332-1, L-521-1, L-615-5 and L-716-7 of the code of intellectual property.
54 Art. 289 of the code of civil procedure. The Court of Justice has had occasion to confirm the nature of this procedure as a provisional measure within the meaning of Article 50 of the TRIPS Agreement (Hermès judgment of 16 June 1998, Case C-53/96, ECR 1998, p. I-3603).
defendant to pay sufficient compensation to cover the applicant's losses in the event of the latter being successful in his action. In Germany, the attitude towards preliminary injunctions is fairly restrictive, and these are granted principally for trade marks in flagrant cases of counterfeiting. In France, it is possible to apply for an interim injunction after the start of the examination of the substance of a case, but this remains relatively rare because, on the one hand, it is possible to submit a request for a description or seizure of the objects held to be counterfeited and, on the other, the provisional measures do not allow damages to be claimed.

As regards the calculation of damages, there are three scenarios in the Member States: compensation for the actual losses suffered; a request for the handing over of the profits made by the infringer; and payment of the royalties which would have been due if the infringer had requested authorisation to use the right. In most countries, the applicant may choose from these three procedures (or at least between the first and the third) without cumulating or combining them. In addition, the practical details of each of these methods of calculation vary widely from one Member State to another. In Germany, for example, in the case of a request for the profits to be handed over, the provisions of the civil code on the return of profits unjustly acquired through "diversion of business" serve as the basis for the request. In the United Kingdom, handing over the profits is considered not as damages but as an "equitable corrective measure". In Portugal (copyright), on the other hand, the infringer's income must be taken into account when calculating the damages. In Austria (copyright), damages can be calculated on the basis of the infringer's profits regardless of the degree of guilt. In Finland (trade marks), the request for the infringer's profits may be justified even in the case of a *bona fide* infringement. In the Benelux countries, handing over the infringer's profits is possible in the case of aggravating circumstances (bad faith). In France, the damaged party is in principle entitled to no less but no more in damages than the real losses suffered.

The right of information, which can be directed against any person involved in an infringement, obliges the defendant to provide information on the origin of the counterfeited products, the distribution channels and the identity of third parties involved in the production and distribution of the goods. Up till now, a right of information has been introduced into the legal system of only a few Member States, *viz.* in Germany in the laws on intellectual property and in the Benelux law on trade marks.

For right holders, these disparities between the national systems of enforcing intellectual property rights have a major impact, in particular on the effectiveness and costs of procedures, time scales and the amount of damages granted.

Finally, as regards the criminal penalties, there are considerable differences not only in the level of punishment laid down by national legislation, but also in the method of calculating fines. Pursuant to the TRIPS Agreement (and national legal tradition), all the Member States have civil redress and criminal penalties going as far as imprisonment. The maximum fines range from several thousand euro (Italy, Luxembourg) to nearly EUR 500 000 (Belgium), and to more than EUR 750 000 (for legal persons in France). In the United Kingdom there is no maximum fine laid down by law. Certain countries do not lay down a maximum fine, since

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55 In this context, the recent trend in German case law towards setting more dissuasive damages should be noted. Called upon to judge a case involving the counterfeiting of designs, the Bundesgerichtshof (BGH), in a judgment of 2.11.2000, considered that the overheads could no longer be deducted from the profits made by the counterfeiter, thereby overturning case law dating from 1962 (IZR 246/98).
56 Art. 1382 of the civil code.
57 See in particular paragraph 19 of the German trade mark law.
58 Art. 13 bis, paragraph 4, of the Benelux law on trade marks.
the amount is calculated according to the income of the infringer (for example, the Nordic countries, Austria and Germany). The prison sentences range from several days to 10 years (Greece, United Kingdom).

Although this Directive does not aim to harmonise criminal penalties as such, the effective application of genuinely deterrent sanctions in all Member States would help greatly in combating counterfeiting and piracy.

D. The need for harmonisation of national legislation

There is a need for right holders to have means of enforcing intellectual property rights which are equally effective in all Member States. Moreover, this need fits in with the Commission's policy of promoting the development of innovatory and creative activity in Europe, in particular through the coherent and effective protection of intellectual property rights in the Internal Market. This need cannot be met by action taken solely at the level of each Member State. National legislation sometimes provides right holders with effective means of enforcing their rights, but the practical implementation of these means is not fully assured. As most of the interested circles in the consultation launched by the Green Paper stressed, only action at Community level will allow the same effectiveness in enforcing intellectual property rights.

Nor would the establishment of rules at Community level directly applicable in all Member States resolve the situation satisfactorily. Account must be taken of the legal traditions and situation of each Member State. The question is to ensure that intellectual property rights are enforced in an equivalent fashion throughout the Community but within the existing national frameworks. That is why harmonisation of the national legislation of the Member States at Community level regarding the means of enforcing intellectual property rights appears necessary in order to achieve the desired objective. To be genuinely effective, harmonisation must be sought on the basis of the national provisions which seem the most suited to satisfy the needs of parties infringed against whilst taking into account the legitimate rights of defence. This will make it possible to enforce intellectual property rights in a homogeneous and effective fashion throughout the Community, to introduce greater transparency into the systems of penalties, and to ensure the effective application of the means made available to right holders.

By virtue of the principle of proportionality set out in Article 5 of the EC Treaty, the measures proposed must be proportionate with regard to the principal objective pursued, which is to improve and increase the transparency of the functioning of the Internal Market. Harmonisation of national legislation should therefore not cover all aspects of national legislation relating to the means of enforcing intellectual property rights, but should be limited to approximating the essential provisions with the most direct impact on the functioning of the Internal Market.

E. Legal basis

As pointed out above in Part I. B, maintaining differing national legal systems for enforcing intellectual property rights, which are nowadays largely harmonised at Community level, is likely to hamper the free movement of goods and services, to create market disturbances within the Internal Market, in particular through distortions in lawful trade flows, and thus falsify the conditions of competition. Approximating the essential national rules governing the means of enforcing intellectual property rights will make it possible to improve and increase the transparency of the functioning of the Internal Market, encourage business innovation and competitiveness and promote employment and investment in the EC.
The European Court of Justice\textsuperscript{59} considers that a practice involving a risk of considerably influencing trade flows between Member States may be likely to hamper the achievement of the objectives of the Common Market as set out in Article 95(1) of the EC Treaty. A Member State introducing and implementing such measures which are less binding than others would create a distortion of trade flows. Lawful business circles would tend to avoid that Member State because of the market share held by pirated or counterfeit products and the difficulty of competing in such a distorted market.

Hence, and given that the objective of the measure is the achievement of the Internal Market through harmonisation of the legislative, regulatory and administrative provisions of the Member States relating to the means of enforcing intellectual property rights, the Commission proposes that Article 95 of the EC Treaty be chosen as the legal basis of the harmonisation. That legal basis was chosen in the case of other Directives approximating national legislation in the field of intellectual property\textsuperscript{60}. Moreover, the justification for this legal basis has been confirmed by the Court of Justice on several occasions\textsuperscript{61}, and in particular as regards Directive 98/44/EC in a recent judgement of the Court of Justice in which the legal basis chosen was closely scrutinised\textsuperscript{62}.

The same legal basis (Article 95) has already allowed harmonisation of a large part of intellectual property law in the Internal Market. The effectiveness of these measures harmonising intellectual property rights might not be ensured if the actual implementation of those rights were not itself ensured. The measures and procedures set out in this Directive will make it possible to ensure the correct application of the \textit{acquis communautaire} relating to the substantive law of intellectual property; it is thus legitimate for Article 95 also to be the legal basis of a Directive ensuring harmonisation of the enforcement of those rights, thereby allowing the relevant \textit{acquis communautaire} to become fully effective.

Bearing the above in mind, and with a view to ensuring the proper functioning of the Internal Market and the full effectiveness of the \textit{acquis communautaire} relating to intellectual property, this Directive is intended to impose on the Member States the obligation to provide

\textsuperscript{60} Cf. the Directives cited in footnotes 8 to 12.
\textsuperscript{62} Judgment in \textit{Netherlands v. Parliament and Council} of 9 October 2001, Case C-377/98. The Court concluded that:

"15. ... it must be borne in mind that recourse to Article 100a as a legal basis is possible if the aim is to prevent the emergence of future obstacles to trade resulting from multifarious development of national laws provided that the emergence of such obstacles is likely and the measure in question is designed to prevent them.
16. ...even if the relevant national provisions predating the Directive are most often taken from the Convention on the Grant of European Patents, ...the differing interpretations to which those provisions are open as regards the patentability of biotechnological inventions are liable to give rise to divergences of practice and case-law prejudicial to the proper operation of the internal market.
20. ...The purpose of harmonisation is to reduce the obstacles, whatever their origin, to the operation of the internal market which differences between the situations in the Member States represent. If divergences are the result of an interpretation which is contrary, or may prove contrary, to the terms of international legal instruments to which the Member States are parties, there is nothing in principle to prevent recourse to adoption of a Directive as a means of ensuring a uniform interpretation of such terms by the Member States."
for effective, proportionate and deterrent penalties\(^{63}\), including criminal penalties\(^{64}\) in appropriate cases. This is also in line with the commitments entered into by both the Community and each Member State under the TRIPS Agreement, and in particular Article 61 of that Agreement. The Directive is also intended to ensure that all those involved in the infringement are pronounced responsible according to the internal law of the Member States.

Finally, this Directive is not intended to harmonise the rules applicable to judicial co-operation, judicial powers, the recognition and enforcement of decisions in civil and commercial matters, nor to set out the applicable law. There are Community instruments which govern such matters in general terms and are thus also applicable to intellectual property\(^{65}\).

**PART FOUR:**

**EXAMINATION OF THE PROVISIONS**

The provisions set out in this proposal are the outcome of a wide-ranging consultation of interested circles, the Member States and the other institutions of the European Union. In the following provisions, all possible account has thus been taken of the concerns expressed by interested circles and Member States. The suggestions made by the European Parliament and the European Economic and Social Committee have also been taken into account. In certain cases, the provisions in force in one or more Member States, and which have proved their effectiveness, were a useful source of inspiration in drawing up this proposal.

**Article 1**

**Objective**

This Article sets out the objective of the Directive, specifying that it relates to the measures needed to ensure the enforcement of intellectual property rights.


\(^{64}\) See in particular the Unilever judgment of the ECJ handed down on 28 January 1999 in Case C-77/97 (ECR 1999, p. I-431), in which the Court stated, with regard to Directive 76/768/EEC, as amended, on the approximation of the laws of the Member States relating to cosmetic products, that "the measures which the Member States are required to take under Article 6(3) of Directive 76/768 in order to prevent advertisements which attribute to cosmetic products characteristics which those products lack must provide that such advertisements constitute a breach of the law and, in particular, a criminal offence punishable by penalties having a deterrent effect."

Article 2

Scope

Article 2(1) sets out the scope of the Directive: the means of enforcing the rights covered by the Directive apply to any infringement of the rights deriving from Community and European provisions on the protection of intellectual property, as set out in the Annex to the Directive, and the provisions adopted by the Member States in order to comply with those provisions when the infringement is carried out for commercial purposes or causes significant harm to the right holder. The Member States may lay down that the competent authorities may order other measures adapted to the circumstances such as to put an end to the infringement of the intellectual property right or to prevent further infringements, as well as any other appropriate measures. Paragraph 2 of this Article lays down that the provisions of this Directive are without prejudice to provisions for enforcement in Community legal instruments in the domain of copyright and related rights and notably Article 8 of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society. Paragraph 3(a) of this Article leaves intact, and does not modify, the Community provisions governing the substantive law on intellectual property, Directive 2000/31/EC on electronic commerce, Directive 1999/93/EC on a Community framework for electronic signatures, and Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data. In other words, the aim is to make it clear that the Directive bears not on the substance, but only on the enforcement, of the rights, and that its implementation by the Member States cannot lead to conflicts with the Directives referred to above. Paragraph 3(b) of this Article lays down that the provisions of this Directive do not affect Member States’ international obligations and notably those found in the TRIPS Agreement.

Article 3

General obligation

This Article imposes on the Member States the general obligation to provide for proportionate measures and procedures needed for enforcing intellectual property rights. It lays down that these measures and procedures must be such as to deprive those responsible of the economic benefits of the infringement in question. It is modelled on the provisions of Article 41(2) of the TRIPS Agreement, which lays down that the measures and procedures in question must be fair and equitable, that they must not be unnecessarily complicated or costly, and that they must not entail unreasonable time-limits or unwarranted delays.

Article 4

Penalties

This Article stipulates that the Member States must lay down that any infringement of an intellectual property right shall be punishable by penalties which must be effective, proportionate and deterrent. It is fully in line with the Commission Communication on the role of penalties in implementing Community internal market legislation (COM(95) 162 final).
Article 5

Persons entitled to apply for application of the measures and procedures

This Article sets out the persons entitled to apply for application of the measures and procedures. Paragraph 1 lays down that the persons entitled to apply for application of the measures and procedures are first and foremost the right holders, the persons authorised to use those rights and their representatives. Paragraph 2 lays down that Member States must provide for rights management or professional defence bodies, as legitimate representatives of the right holder, to be entitled to apply for the application of the measures and procedures and to initiate legal proceedings for the defence of those rights or of the collective or individual interests for which they are legally responsible. This provision is based on existing provisions in the legislation of certain Member States (Article 98 of the Belgian law of 1991 on consumer protection; Article L-421 of the French consumer protection code; Article L-331-1(2) of the French intellectual property code). This paragraph stipulates, finally, that the Member States must take the necessary steps to ensure that the rights management or professional defence bodies of another Member State may apply for application of the measures and procedures and initiate legal proceedings on the same conditions as a national body. This provision is in application of the principle of non-discrimination and is without prejudice to applicable rules on representation in court.

Article 6

Presumption of copyright

This Article reflects the implementation of presumptions in the field of copyright provided for explicitly by the Berne Convention (Article 15) and indirectly by the TRIPS Agreement. The Berne Convention states as follows: “In order that the author of a literary or artistic work ... shall ... be regarded as such, and consequently be entitled to institute infringement proceedings in the countries of the Union, it shall be sufficient for his name to appear on the work in the usual manner”. Provisions to this effect are contained in the legislations of the Member States.

Article 7

Evidence

Article 7 sets out a number of obligations on Member States with regard to evidence, which is of paramount importance in cases of infringement of an intellectual property right. Paragraph 1 lays down that the parties may be ordered, under certain conditions, to produce evidence under their control, provided that the protection of confidential information is ensured. It too is modelled on the provisions of Article 43 of the TRIPS Agreement. Paragraph 2 states that Member States shall take such measures as are necessary to enable the judicial authorities to order the communication or seizure of bank, financial or commercial documents.

Article 8

Evidence protection measures

Paragraph 1 of this Article provides in favour of the right holder, even before the examination of the merits of a case has started, for a procedure involving descriptive or physical seizure if there is a demonstrable risk that the evidence may be destroyed. By order issued on
application, and if necessary without the other party being heard, the right holder, in the event of an infringement or if the circumstances point to an impending infringement, may initiate either a detailed description, with or without the taking of samples, or the physical seizure of the infringing goods. Where the order has been issued without the defendant being heard, the latter shall subsequently have the right to request a review of the order and the right to be heard at this review. Paragraph 2 lays down that physical seizure may be made subject to the lodging of a guarantee adequate to ensure compensation for the defendant in the event of an unjustified application. Paragraph 3 lays down that the applicant then has 31 calendar days to institute substantive proceedings before the court, failing which the seizure is null and void, without prejudice to the damages which may be claimed from him. This measure supplements the provisions of Article 43 of the TRIPS Agreement and is modelled on provisions which have demonstrated their effectiveness in certain Member States such as the United Kingdom (Anton Piller order, Doorstep order) and France (saisie-contrefaçon). Finally, this paragraph lays down, following the example of Article 50(7) of the TRIPS Agreement, a mechanism for the compensation of the defendant in certain situations where they have suffered harm as a result of the evidence protection measures set out in this Article.

Article 9

Right of information

This Article supplements Article 47 of the TRIPS Agreement on the right of information. It is modelled on the relevant existing provisions in certain legislations (Benelux, Germany). It takes over a provision which had been introduced at the request of the European Parliament into the amended proposal for a Directive on the legal protection of designs (Article 16(a) of the text in document COM(96) 66 final), and which was then withdrawn at the request of the Council, which considered that the Directive on designs was not a suitable instrument for combating counterfeiting, and that the problems arising in this field should be the subject of specific measures. This measure received the unanimous support of interested circles, the European Parliament and the Economic and Social Committee. Paragraph 1 lays down that the competent authorities must order, at the request of the right holder and unless particular reasons are invoked for not doing so, any person involved in the infringement under the circumstances set out in points (a), (b) or (c) of that paragraph to provide the right holder with information on the origin of the infringing goods and services and on the networks for their distribution or provision, respectively. Paragraph 2 sets out the nature of the information to be provided. Paragraph 3 lays down that the right of information applies without prejudice to other provisions set out on a restrictive basis and relating to the communication of information. Finally, paragraph 4 lays down, on the other hand, that the competent authorities (for example, police, customs) in possession of information of the same nature may so inform the right holder, provided the latter is known, while complying with the rules governing the protection of confidential information, in order to allow him to institute substantive proceedings before the competent court or to obtain provisional or precautionary measures.

Article 10

Provisional measures

Article 10 lays down a number of provisions with regard to provisional measures which the Member States must make available to the competent authorities. These provisions supplement those of Article 50 of the TRIPS Agreement. The provisional measures are of paramount importance in the event of an infringement of intellectual property rights, since in almost all cases it is in the interest of the right holder to take rapid action. Paragraph 1
provides for the granting of an injunction, on a provisional basis and subject to a financial penalty, intended to prevent any impending infringement, or to forbid the continuation of the infringement, or to make such continuation subject to the lodging of a guarantee intended to ensure that the right holder is compensated. This same paragraph provides that the judicial authorities shall have the authority to require the applicant to provide any reasonably available evidence in order to satisfy themselves with a sufficient degree of certainty that the applicant is the right holder and that the applicant’s right is being infringed or, that such infringement is imminent. Pursuant to paragraph 2, such provisional measures may in appropriate cases be taken without the other party being heard, in particular when any delay would be such as to cause irreparable prejudice to the right holder. The party concerned must be so informed without delay after the execution of the measures. In addition, at the request of the defendant, these measures may be reviewed, including the right to be heard. Paragraph 3 lays down that the application for an injunction is admissible only if the proceedings were instituted within 31 calendar days at the most from the day on which the right holder became aware of the infringement. Pursuant to paragraph 4, the prohibition may be made subject to the lodging by the applicant of a guarantee intended to ensure any compensation of the damage suffered in the event of an unjustified application. Finally, paragraph 5 lays down, following the example of Article 50(7) of the TRIPS Agreement, a mechanism for the compensation of the defendant in certain situations where they have suffered harm as a result of the provisional measures set out in this Article.

**Article 11**

**Precautionary measures**

Article 11(1) provides that, in appropriate cases, and in particular if the prejudiced party demonstrates circumstances likely to threaten the recovery of damages, and if necessary without the other party being heard, the precautionary seizure of the movable and immovable property of the infringer, including the blocking of his bank accounts and other assets, may be ordered. This measure is modelled on the provision in British law known as the freezing injunction or Mareva injunction. The communication or seizure of bank, financial or commercial documents may also be ordered so as to identify and prosecute the real beneficiaries of the infringement. Finally, paragraphs 2 and 3 lay down a guarantee and subsequent compensation mechanism in the same way as Articles 8 and 10.

**Article 12**

**Recall of goods**

This Article provides for the recall, at the infringer's expense, of infringing goods placed on the market, without prejudice to the damages due to the right holder. This measure has been developed by Dutch case law.

**Article 13**

**Removal from the channels of commerce**

The Article lays down that goods which have infringed an intellectual property right, as well the materials and implements used for the purpose of such infringement, must be removed from the channels of commerce without compensation of any kind. This also involves the confiscation of such items, as provided for in Article 87(2) of the Belgian copyright law of 30 June 1994. This provision also lays down the scope of Article 46 of the TRIPS Agreement.
**Article 14**

**Destruction of goods**

Article 14 provides for the destruction of the infringing goods where their presence on the market is detrimental to the holder of the intellectual property right. This Article is based on Article 46 of the TRIPS Agreement.

**Article 15**

**Preventive measures**

Article 15 lays down that, where there has been a previous court decision, the Member States must provide that the competent authorities may impose on the infringer an injunction aimed at preventing new infringements, non-compliance with an injunction being punishable by a fine accompanied, where applicable, by a financial penalty. This provision sets out the scope and the penalty of the prohibitory injunction provided for by Article 44(1) of the TRIPS Agreement. Paragraph 2 lays down that the Member States must ensure that right holders are in a position to apply for an injunction to be imposed on intermediaries whose services are used by third parties to infringe an intellectual property right.

**Article 16**

**Alternative measures**

Article 16 lays down that a person committing an infringement without fault or negligence on his part may make a pecuniary reparation to the prejudiced party if the execution of the measures in question would cause him disproportionate damage and where the prejudiced party can reasonably be satisfied with pecuniary compensation. This provision is modelled on Article 101(1) of the German copyright law. To protect the interests of a defending party who has acted without fault of negligence, this provision permits reparation in the form of a fixed-rate remuneration instead of the application of the penalties referred to in the same section.

**Article 17**

**Damages**

Article 17 on damages supplements the provisions of Article 45 of the TRIPS Agreement. Paragraph 1 confirms the principle that the damages are intended to compensate for the prejudice suffered because of an infringement committed intentionally or by mistake. Paragraph 1 accordingly lays down that the prejudiced party is entitled either to fixed-rate damages equal to double the amount of the royalties or fees which would have been due if the infringer had requested authorisation (the aim being to provide for full compensation for the prejudice suffered, which is sometimes difficult for the right holder to determine. This provision does not constitute punitive damages; rather, it allows for compensation based on an objective criterion while taking account of the expense incurred by the right holder such as administrative expenses incurred in identifying the infringement and researching its origin) or to compensatory damages (corresponding to the losses suffered by the right holder, including loss of earnings). It is further laid down that elements other than economic factors may be taken into account in calculating the damages, such as the moral prejudice caused to the right holder by the infringement. Paragraph 2 provides that, in appropriate cases, profits made by the infringer which are not taken into account in calculating the compensatory damages may
be added. The idea is to provide a deterrent against, for example, intentional infringements perpetrated on a commercial scale. For calculating the aforementioned profits, the right holder is bound to provide evidence only with regard to the amount of the gross income achieved by the infringer, with the latter being bound to provide evidence of his deductible expenses and profits attributable to factors alien to the infringement.

Article 18

Legal costs

Article 18 provides for the legal costs, lawyer's fees and any other expenses incurred by the successful party (for example, investigation costs, costs for expert opinions) to be borne in full by the other party, unless equity or the economic situation of the other party does not allow this. This possibility is partly provided for by Article 45(2) of the TRIPS Agreement.

Article 19

Publication of judicial decisions

Article 19 concerns the publication of judicial decisions, which is generally considered an effective measure for informing the public and a deterrent against infringements of intellectual property rights. Paragraph 1 lays down that Member States must take the necessary measures to ensure that, in the event of legal proceedings instituted for infringements of intellectual property rights, the judicial authorities can order that the decision be posted and published in full or in part, at the request of the right holder and the expense of the infringer, in the newspapers designated by the former. Such publication must comply with the rules on the protection of natural persons with regard to the processing of personal data. Paragraph 2 lays down that Member States may also provide for other measures which are appropriate in the particular circumstances (for example, informing customers by mail).

Article 20

Provisions under criminal law

This Article is intended to ensure that all serious infringements, as well as attempts at, participation in and instigation of serious infringements of an intellectual property right are punishable by effective, proportionate and deterrent criminal penalties. For the purposes of this Article, an infringement is considered serious if it is committed intentionally and for commercial purposes. This provision reflects the undertakings entered into under the TRIPS Agreement, in particular Article 61, in extending the obligation set out by this Article to all the intellectual property rights covered by Article 2(1) of this directive. In paragraph 2, it is also laid down that, for natural persons, such penalties may include imprisonment. For natural and legal persons, paragraph 3 provides for fines, the confiscation of the infringing goods and of the materials, implements or media used predominantly for the manufacture or distribution of the goods in question. This provision is modelled on Article 46 of the TRIPS Agreement. The same paragraph provides for the destruction of the infringing goods where their presence on the market causes prejudice to the holder of the intellectual property right. This paragraph also provides — in appropriate cases (for example, repeat offences) — for the total or partial, definitive or temporary closure of the establishment or shop used predominantly to commit the infringement. Provision is also made for a permanent or temporary ban on engaging in commercial activities, placement under judicial supervision or judicial winding-up, and a ban on access to public assistance or subsidies. Since counterfeiting and piracy are nowadays
carried out by industrial undertakings operating on a large scale, such measures are a powerful weapon for combating the manufacture and sale of counterfeit or pirated products and reflect in part the corresponding provisions of Spanish (Articles 271 and 276 of the Criminal Code) and French (Articles L-335-5, L-521-4 and L-716-11-1 of the intellectual property code) legislation. Also provided for, finally, is the publication of judicial decisions as an additional deterrent. This can also serve as a channel of information both for right holders and for the public at large. The final paragraph defines, for the purposes of this Article, what is meant by the term "legal person".

Article 21

Legal protection of technical devices

Article 21 establishes legal protection for technical devices in the field of industrial property. Technical devices are used to protect and authenticate products or services. They are designed for the manufacture of authentic goods and the incorporation therein of overt elements which are identifiable by customers and consumers and make it easier to recognise the goods as being authentic. These elements can take many forms: security holograms, optical devices, smart cards, magnetic systems, special inks, microscopic labels, etc. Similar protection already exists in certain domains (Article 6 of Directive 2001/29/EC of the European Parliament and of the Council on the harmonisation of certain aspects of copyright and related rights in the information society; Article 4 of Directive 98/84/EC of the European Parliament and of the Council on the legal protection of services based on, or consisting of, conditional access). Paragraph 1 lays down that, without prejudice to existing provisions in the field of copyright, the Member States must forbid certain acts (manufacture, import, distribution, use) relating to illegal technical devices. Paragraph 2 lays down what is meant by "technical device" and "illegal technical device" for the purposes of applying this Article.

Article 22

Codes of conduct

Paragraph 1 of this Article lays down that the Member States and the Commission must encourage the establishment of codes of conduct designed to assist with the enforcement of intellectual property rights. Paragraph 1(b) concerns the monitoring of the manufacture of optical discs (CD, CD-ROM, DVD), in particular by means of an embedded source code which makes it possible to identify the origin of their manufacture. Paragraph 1(c) provides for the communication to the Member States and the Commission of the codes of conduct established and any assessments of their application. Formulation of the codes of conduct is based, in particular, on the provisions of Article 16 of Directive 2000/31/EC on electronic commerce. Paragraph 2 confirms that any such codes of conduct must be compatible with Community law.

Article 23

Assessment

This Article provides for an assessment of the functioning of the Directive, as set out in other Community acts (for example, Article 16 of Directive 98/44/EC on the legal protection of biotechnological inventions; Article 18 of Directive 98/71/EC on the legal protection of designs; Article 15 of Regulation (EC) No 3295/94, as amended, laying down certain measures concerning the introduction into the Community and the export and re-export
outside the Community of goods infringing certain intellectual property rights). Paragraph 1 lays down that, three years after transposition of the Directive, each Member State must submit to the Commission a report informing it of the situation with regard to implementation of this Directive. On the basis of these national reports, the Commission will draw up a report on the application of the Directive, including an assessment of the effectiveness of the measures taken by the various competent bodies and instances, as well as an evaluation of its impact on innovation and the development of the information society. This report will then be transmitted to the European Parliament, the Council and the European Economic and Social Committee. It will be accompanied, if necessary, by proposals for amendments to the Directive in order to bring it into line with the developments observed in the Internal Market. Paragraph 2 lays down that the Member States must provide the Commission with all the aid and assistance it may need when drawing up that report.

Article 24

Correspondents

Article 24 provides for the establishment of a network of correspondents in the Member States. Paragraph 1 lays down that each Member State must designate one or more correspondents for any question relating to the implementation of the means of enforcing intellectual property rights in the Internal Market, including the means set out in this Directive. The details of these correspondents must be communicated to the other Member States and the Commission. Paragraph 2 lays down that, in order to ensure the proper application of the Directive, the Member States must co-operate with the other Member States and with the Commission via their correspondents and provide the assistance and information requested as rapidly as possible, including by electronic means.

Article 25

Implementation

This Article concerns the measures for transposing the Directive into the internal law of the Member States. Paragraph 1 lays down that the Member States must implement the legislative, regulatory and administrative provisions necessary to comply with this Directive no later than eighteen months after the date of adoption of this Directive and must inform the Commission immediately thereof. This deadline of eighteen months is modelled on the provisions of other Directives. The national transposing provisions must contain a reference to this Directive or be accompanied by such a reference on their official publication, the details of that reference being decided by the Member States. Paragraph 2 lays down that the Member States must communicate to the Commission the text of the provisions of national law adopted in the field of the Directive.

Article 26

Entry into force

This Article lays down that the Directive enters into force on the twentieth day following its publication in the Official Journal of the European Union, pursuant to the provisions of Article 254(1) of the EC Treaty.
Article 27

Addressees

This Article lays down that this Directive is addressed to the Member States.
Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on measures and procedures to ensure the enforcement of intellectual property rights

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 95 thereof,

Having regard to the proposal from the Commission¹,

Having regard to the opinion of the European Economic and Social Committee²,

Having regard to the opinion of the Committee of the Regions³,

Acting in accordance with the procedure laid down in Article 251 of the Treaty⁴,

Whereas:

(1) The achievement of the Internal Market entails eliminating restrictions on freedom of movement and distortions of competition, while creating an environment conducive to innovation and investment. In this context, the protection of intellectual property is an essential element for the success of the Internal Market. The protection of intellectual property is important not only for promoting innovation and creativity, but also for developing employment and improving competitiveness.

(2) The protection of intellectual property must allow the inventor or creator to derive a legitimate profit from his invention or creation. It must also allow the widest possible dissemination of works, ideas and new know-how. At the same time, the protection of intellectual property must not hamper freedom of expression or the free movement of information, or the protection of personal data, including on the Internet.

(3) However, without effective means of enforcing intellectual property, innovation and creativity are discouraged and investment diminished. It is therefore necessary to ensure that the substantive law on intellectual property, which is nowadays largely part of the acquis communautaire, is applied effectively in the Community. In this respect, the means of enforcing intellectual property rights are of paramount importance for the success of the single market.

¹ OJ C [...], […], p.[…].
² OJ C [...], […], p.[…].
³ OJ C [...], […], p.[…].
⁴ OJ C [...], […], p.[…].
At international level, all Member States, as well as the Community itself as regards matters within its competence, are bound by the Agreement on Trade-Related Aspects of Intellectual Property (the "TRIPS Agreement"), approved, as part of the multilateral negotiations of the Uruguay Round, by Council Decision 94/800/EC concluded in the framework of the World Trade Organisation.

The TRIPS Agreement contains, in particular, provisions on the means of enforcing intellectual property rights which are common standards applicable at international level and implemented in all Member States. The provisions of this Directive should not affect Member States’ international obligations, including those under the TRIPS Agreement.

There are also international conventions to which all Member States are parties and which also contain provisions on the means of enforcing intellectual property rights. These include, in particular, the Paris Convention for the Protection of Industrial Property, the Berne Convention for the Protection of Literary and Artistic Works, and the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations.

It emerges from the consultations held by the Commission on this question that, in the Member States, and despite the provisions of the TRIPS Agreement, there are still major disparities as regards the means of enforcing intellectual property rights. For instance, the arrangements for applying provisional measures, which are used in particular to safeguard evidence, the calculation of damages, or the arrangements for applying injunctions, vary widely from one Member State to another. In some Member States, there are no measures and procedures such as the right of information and the recall, and the infringer's expense, of the infringing goods placed on the market.

The disparities between the systems of the Member States for enforcing intellectual property rights are prejudicial to the proper functioning of the Internal Market and make it impossible to ensure that intellectual property rights enjoy an equivalent level of protection throughout the Community. This situation does not promote free movement within the Internal Market nor create an environment conducive to healthy competition.

The current disparities also lead to a weakening of the substantive law on intellectual property and to a fragmentation of the Internal Market in this field. This causes a loss of confidence in the Internal Market in business circles, with a consequent reduction in investment in innovation and creation. Infringements appear to be increasingly linked to organised crime. Increasing use of the Internet enables pirated products to be distributed instantly around the globe. Effective enforcement of the substantive law on intellectual property, which is nowadays largely part of the _acquis communautaire_, must be ensured by specific action at Community level. Approximation of the legislation of the Member States in this field is therefore an essential prerequisite for the implementation of the Internal Market.

The objective of this Directive is to approximate legislative systems so as to ensure a high, equivalent and homogeneous level of protection in the Internal Market. This protection is essential against infringements carried out on for commercial purposes or

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which cause significant harm to the right holder, apart from minor and isolated infringements.

(11) This Directive does not aim to establish harmonised rules for judicial cooperation, jurisdiction, the recognition and enforcement of decisions in civil and commercial matters, nor to deal with applicable law. There are Community instruments which govern such matters in general terms and are, in principle, equally applicable to intellectual property.

(12) This Directive shall not affect the application of the rules of competition, and in particular Articles 81 and 82 of the Treaty.

(13) It is necessary to define the scope of this Directive as widely as possible in order to encompass all the intellectual property rights covered by Community provisions in this field and by the resulting national provisions, while excluding certain activities which do not involve intellectual property in the strict sense. Nevertheless, that requirement does not affect the possibility, on the part of those Member States which so wish, to extend, for internal purposes, the provisions of this Directive to include acts involving unfair competition or similar activities.


(16) The measures and procedures designed to enforce intellectual property rights must be effective and place the right holder in the situation in which he would have been were it not for the infringement in question.

(17) In order to improve and extend access to justice, the persons entitled to request application of these measures and procedures should be not only the right holders but also the professional organisations in charge of the management of those rights or for the defence of the collective and individual interests for which they are responsible.

(18) It is appropriate to adopt the rule in Article 15 of the Berne Convention, which establishes the presumption whereby the author of a literary or artistic work is regarded as such if his name appears on the work. Moreover, as copyright exists as

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from the creation of a work and does not require formal registration as in the case of an industrial property right, it is useful to recall the principle that a work is considered to be sufficiently creative enjoy copyright protection until proven otherwise. This principle is of particular importance when an author seeks to defend his rights in a legal dispute and represents largely current practice in Member States’ national jurisdictions.

(19) Given that evidence is an element of paramount importance for establishing the infringement of intellectual property, it is appropriate to ensure that effective means of presenting and obtaining evidence is available to all parties.

(20) If there is a duly established danger that evidence may be destroyed, an effective and inexpensive procedure must be made available to the parties which allows for the detailed description, with or without the taking of samples, or the physical seizure of the infringing goods and, in appropriate cases, of the documents relating thereto. The procedure must have regard to the rights of the defence and must provide the necessary guarantees.

(21) Other measures designed to ensure a high level of protection exist in certain countries and must be made available in all the Member States. This is the case with the right of information, which allows precise information to be obtained on the origin of the infringing goods, the distribution channels and the identity of the third parties involved in the infringement, as well as the publication of judicial decisions on infringements of intellectual property, which makes it possible to inform the public and deter third parties from committing such infringements.

(22) It is also essential to provide for provisional measures allowing for the immediate termination of the infringement without awaiting a decision on the substance of the case, while observing the rights of the defence, ensuring the proportionality of the provisional measures as appropriate to the characteristics of the case in question and providing the guarantees needed to cover the costs and the injury caused to the defendant by an unjustified request. Such measures are particularly justified when any delay would cause irreparable prejudice to the holder of an intellectual property right.

(23) Depending on the particular case, and if justified by circumstances, the measures and procedures to be provided for must include prohibitory measures aimed at preventing further infringements of intellectual property, as well as preventive and corrective measures, such as the confiscation of the infringing goods and other objects used predominantly for illegal purposes, removal from the channels of commerce, possible destruction and the recall, at the infringer's expense where appropriate, of the infringing goods placed on the market.

(24) With a view to compensating for the prejudice suffered as a result of an infringement committed by an infringer who has engaged in an activity in the knowledge, or with reasonable grounds for knowing, that it would give rise to such an infringement, the amount of damages awarded to the right holder should be set either at a fixed rate equal to double the royalties or fees which would have been due if the infringer had requested authorisation to use the intellectual property right in question (the aim being to allow for compensation based on an objective criterion while taking account of the expenses incurred by the right holder, such as the costs of identification and research), or according to the actual prejudice (including loss of earnings) suffered by the right holder (compensatory damages), to which must be added the profits made by the
infringer, which are not taken into account in calculating the compensatory damages. It must also be possible to take into account other elements, such as the moral prejudice caused to the right holder.

(25) In order to ensure the proper functioning of the Internal Market, and in accordance with the undertakings entered into under the TRIPS Agreement, and in particular Article 61 thereof, Member States are required to punish serious infringements of intellectual property in an effective, proportionate and deterrent fashion under criminal law. To this end, “serious infringement” means acts which are carried out intentionally and for commercial purposes. All or some of those participating in the infringement or attempted infringement, should be declared responsible, according to the particular country's internal law, as accomplices or instigators.

(26) Protection measures make a major contribution towards combating infringements of intellectual property. Appropriate legal protection of security and authenticication devices which protect against copying, manipulation or neutralisation is therefore necessary in the field of industrial property, and already exists in the field of copyright. Moreover, these protection measures targeting the abuse of technical devices to infringe intellectual property rights are in line with Article 6 of the Convention on Cybercrime adopted by the Council of Europe in Budapest on 23 November 2001.

(27) Industry must take an active part in the fight against piracy and counterfeiting. The development of codes of conduct in the circles directly affected is a supplementary means of bolstering the regulatory framework. The Member States, in collaboration with the Commission, should encourage the development of codes of conduct in general. Monitoring of the manufacture of optical discs, particularly by means of an identification code embedded in discs produced on the territory of the Community, helps to limit infringements of intellectual property in this sector which suffers from piracy on a large scale. However, these technical protection measures must not be misused with a view to protecting markets and preventing parallel imports.

(28) In order to facilitate the uniform application of the provisions set out in this Directive, it is appropriate to provide for systems of cooperation and mutual assistance between Member States, on the one hand, and between the Member States and the Commission on the other, in particular by creating a network of correspondents designated by the Member States. Within this framework, a Contact Committee made up of national correspondents could also be set up within the Commission.

(29) Since the objectives of this Directive cannot be sufficiently achieved by the Member States for the reasons already described, and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality as set out in that Article, this Directive does not go beyond what is necessary in order to achieve its objectives.

(30) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular, this Directive seeks to ensure full respect for intellectual property (Article 17(2) of the Charter of Fundamental Rights of the European Union),
HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I

OBJECTIVE AND SCOPE

Article 1

Subject-matter

This Directive concerns the measures necessary to ensure the enforcement of intellectual property rights.

Article 2

Scope

1. Without prejudice to the means which are or may be provided for in Community or national legislation, in so far as those means may be more favourable for right holders, the measures provided for by this Directive shall apply to any infringement of the rights deriving from Community and European acts on the protection of intellectual property, as listed in the Annex, and from the provisions adopted by the Member States in order to comply with those acts when the infringement is committed for commercial purposes or causes significant harm to the right holder.

2. This Directive shall be without prejudice to the particular provisions on the enforcement of rights contained in Community legislation concerning copyright and notably those found in Directive 2001/29/EC.

3. This Directive shall not affect:

a) the Community provisions governing the substantive law on intellectual property, Directive 95/46/EC, Directive 1999/93/EC or Directive 2000/31/EC;

b) Member States’ international obligations and notably the Agreement on Trade-Related Aspects of Intellectual Property Rights (the “TRIPS Agreement”).
CHAPTER II

MEASURES AND PROCEDURES

SECTION 1

GENERAL PROVISIONS

Article 3

General obligation

Member States shall provide for the proportionate measures and procedures needed to ensure the enforcement of the intellectual property rights covered by this Directive.

These measures and procedures shall be such as to remove from those responsible for an infringement of an intellectual-property right the economic benefits of that infringement. They shall be fair and equitable, and shall not be unnecessarily complicated or costly, nor entail unreasonable time-limits or unwarranted delays.

These measures and procedures shall be applied in such a manner as to avoid the creation of barriers to legitimate trade.

Article 4

Penalties

Member States shall ensure that any infringement of an intellectual property right covered by Article 2 is punishable by penalties. These penalties must be effective, proportionate and deterrent.

Article 5

Persons entitled to apply for the application of the measures and procedures

1. Member States shall recognise as persons entitled to apply for application of the measures referred to in this Chapter the holders of intellectual property rights, as well as all other persons authorised to use those rights in accordance with the applicable law, or their representatives.

2. Member States shall confer upon rights management or professional defence bodies, wherever they represent intellectual property right holders or other persons authorised to use these rights according to the applicable law, an entitlement to seek application of the measures and procedures referred to in this Chapter, including the authority to initiate legal proceedings for the defence of those rights or of the collective or individual interests for which they are responsible.
Such entitlement shall be accorded to any properly constituted rights management body or professional defence body, regardless of the Member State in which it is established.

The first and second subparagraphs shall be without prejudice to the applicable rules on the representation of parties in court proceedings.

Article 6

Presumption of copyright tenure

Until proved otherwise, authorship of a work shall be presumed to be vested in the person whose name, presented as being that of the author, is featured on copies of the work, or whose authorship is referred to on a copy of the work by way of a statement, label or other mark.

SECTION 2

EVIDENCE

Article 7

Evidence

1. Member States shall lay down that, where a party has presented reasonably accessible evidence sufficient to support its claims, and has, in substantiating those claims, cited evidence which is to be found under the control of the opposing party, the judicial authorities may order that such evidence be produced by the opposing party, subject to the protection of confidential information.

2. In order to identify and prosecute the real beneficiaries of the infringement, Member States shall take such measures as are necessary to enable the responsible authorities to order the communication or seizure of banking, financial or commercial documents, subject to the protection of confidential information.

Article 8

Measures for protecting evidence

1. Member States shall lay down that, where there is a demonstrable risk that evidence may be destroyed even before the commencement of proceedings on the merits of the case, the judicial authorities may, in the event of an actual or imminent infringement of an intellectual property right, authorise in any place either the detailed description, with or without the taking of samples, or the physical seizure of the infringing goods, and, in appropriate cases, the documents relating thereto. These measures shall be taken by order issued on application, if necessary without the other party having been heard.
Where evidence-protection measures have been adopted without the other party having been heard, the affected parties shall be given notice immediately after the execution of the measures at the latest. A review, including a right to be heard, shall take place upon request of the affected parties with a view to deciding, within a reasonable period after the notification of the measures, whether the measures shall be modified, revoked or confirmed.

2. Member States shall lay down that physical seizure may be subject to the applicant’s lodging of an adequate guarantee intended to ensure compensation for any prejudice suffered by the defendant if the proceedings instituted against him are subsequently judged to be unfounded.

3. Member States shall lay down that, if the applicant has not instituted legal proceedings leading to a decision on the merits of the case within 31 calendar days of the seizure, the seizure shall be null and void, without prejudice to the damages which may be claimed.

Where the evidence protection measures have been revoked, or where they lapse owing to any act or omission by the applicant, or where it is subsequently found that there has been no infringement of any intellectual property right, the judicial authorities shall have be empowered to order the applicant, at the defendant’s request, to provide the defendant with adequate compensation for any injury caused by the measures.

SECTION 3

RIGHT OF INFORMATION

Article 9

Right of information

1. Member States shall lay down that, in order to deal with proceedings involving an infringement of an intellectual property right, or in response to a request for provisional or precautionary measures, the judicial authorities shall order, at the request of the right holder, unless particular reasons are invoked for not doing so, any person to provide information on the origin of the goods or services which are thought to infringe an intellectual property right and on the networks for their distribution or provision, respectively, if that person:

(a) was found in possession, for commercial purposes, of the infringing goods;

(b) was found to be using the infringing services for commercial purposes; or

(c) was indicated by the person referred to in point (a) or (b) as being at the origin of the goods or services or as being a link in the network for distributing those goods or providing those services.

2. The information referred to in paragraph 1 shall comprise:
(a) the names and addresses of the producers, distributors, suppliers and other previous holders of the product or service, as well as the intended wholesalers and retailers;

(b) information on the quantities produced, delivered, received or ordered, as well as the price obtained for the goods or services in question.

3. Paragraphs 1 and 2 shall apply without prejudice to other provisions which:

(a) grant the right holder rights to receive fuller information;

(b) govern the use in civil or criminal proceedings of the information communicated pursuant to this Article;

(c) govern responsibility for misuse of the right of information; or

(d) afford an opportunity for refusing to provide information which would force the person referred to in paragraph 1 to admit to the existence of an infringement of an intellectual property right.

4. Apart from the cases referred to in paragraph 1, Member States shall lay down that, when the responsible authorities are in possession of the information referred to in paragraph 2, they may so inform the right holder, provided the latter is known, while complying with the rules on the protection of confidential information, in order to allow the right holder to institute proceedings leading to a decision on the merits of the case or to obtain provisional or precautionary measures.

SECTION 4

PROVISIONAL AND PRECAUTIONARY MEASURES

Article 10

Provisional measures

1. Member States shall lay down that the judicial authorities may serve the alleged infringer, or the intermediary whose services are being used by a third party to infringe a right, with an interlocutory injunction intended to prevent any impending infringement of an intellectual property right, or to forbid, on a provisional basis and subject to a recurrent fine, the continuation of the alleged infringements of an intellectual property right, or to make such continuation subject to the lodging of guarantees intended to ensure the compensation of the right holder.

The judicial authorities shall be empowered to require the applicant to provide any reasonably available evidence in order to satisfy themselves with a sufficient degree of certainty that the applicant is the right holder and that the applicant’s right is being infringed or, that such infringement is imminent.

2. Member States shall lay down that the provisional measures referred to in paragraph 1 may in appropriate cases be taken without the defendant having been heard, in particular when any delay would cause irreparable prejudice to the right
holder. In the event of this happening, the defendant shall be so informed without delay after the execution of the measures.

A review, including the right to be heard, shall take place at the request of the defendant in order to decide, within a reasonable time after notification of the measures, whether they are to be amended, revoked or confirmed.

3. Member States shall lay down that a prohibitory measure shall be revoked if the applicant does not institute proceedings leading to a decision on the merits of the case within thirty-one calendar days from the day on which the right holder became aware of the facts on which it is based.

4. The judicial authorities may make the prohibition subject to the lodging by the applicant of adequate guarantees intended to ensure any compensation of the prejudice suffered by the defendant if the proceedings on the merits are subsequently judged to be unfounded.

5. Where the provisional measures have been revoked or where they lapse due to any act or omission by the applicant, or where it is subsequently found that there has been no infringement or threat of infringement of an intellectual property right, the judicial authorities shall have the authority to order the applicant, at the request of the defendant, to provide the defendant adequate compensation for any injury caused by these measures.

**Article 11**

**Precautionary measures**

1. The Member States shall lay down that, in appropriate cases, and in particular if the injured party demonstrates circumstances likely to threaten the recovery of damages, and if necessary without the other party having been heard, the judicial authorities may authorise the precautionary seizure of the fixed and non-fixed assets of the infringer, including the blocking of his bank accounts and other assets.

In order to ensure the implementation of the provisions set out in the first paragraph, Member States shall also take the necessary steps to allow the judicial authorities to order the communication or seizure of bank, financial or commercial documents

2. The judicial authorities may make the measures provided for in paragraph 1 subject to the lodging by the applicant of guarantees adequate to ensure possible compensation for the prejudice suffered by the defendant if the proceedings on the merits are subsequently judged to be unfounded.

3. Where the precautionary measures are revoked, or where they lapse due to any act or omission by the applicant, or where it is subsequently found that there has been no infringement of an intellectual property right, the judicial authorities shall have the authority to order the applicant, upon request of the defendant, to provide the defendant adequate compensation for any injury caused by these measures.
SECTION 5

MEASURES RESULTING FROM A DECISION ON THE MERITS OF THE CASE

Article 12

Recall of goods

Without prejudice to the damages due to the right holder by reason of the infringement, Member States shall lay down that the judicial authorities may order the recall, at the infringer's expense in appropriate cases, of the goods which have been found to infringe an intellectual property right.

Article 13

Disposal outside the channels of commerce

Member States shall lay down that the judicial authorities may order that the goods which have been found to infringe an intellectual property right, as well as the materials and implements used primarily for the creation or the manufacture of the goods in question, be disposed of outside the channels of commerce, without any compensation being due.

Article 14

Destruction of goods

Member States shall lay down that the judicial authorities may order the destruction of the goods which have been found to infringe an intellectual property right, without there being any entitlement to compensation.

Article 15

Preventive measures

1. Member States shall lay down that, when a judicial decision has been taken finding an infringement of an intellectual property right, the judicial authorities may serve the infringer with an injunction aimed at prohibiting the continuation of the infringement. Non-compliance with an injunction shall be punishable by a fine accompanied, where applicable, by a recurring fine, with a view to ensuring compliance.

2. Member States shall ensure that right holders are able to apply for an injunction to be addressed to intermediaries whose services are used by third parties to infringe an intellectual property right.
Article 16

Alternative measures

In appropriate cases, Member States shall lay down that, if the person liable to be subjected to the measures provided for in this Section has acted without fault or negligence but has nevertheless caused injury to the applicant, that person may, if execution of the measures in question would cause him disproportionate harm and if the injured party could reasonably be satisfied with pecuniary compensation, compensate that party in cash, with the latter’s agreement.

SECTION 6

DAMAGES AND LEGAL COSTS

Article 17

Damages

1. Member States shall lay down that the judicial authorities shall order an infringer to pay the right holder adequate damages in reparation of the damage incurred by the latter as a result of his intellectual property right being infringed through the infringer having engaged in an activity in the knowledge, or with reasonable grounds for knowing, that it would give rise to such an infringement.

To this end, the competent authorities shall award, at the request of the prejudiced party:

(a) either damages set at double the royalties or fees which would have been due if the infringer had requested authorisation to use the intellectual property right in question;

(b) or compensatory damages corresponding to the actual prejudice (including lost profits) suffered by the right holder as a result of the infringement.

In appropriate cases, Member States shall lay down that the prejudice suffered can also be deemed to include elements other than economic factors, such as the moral prejudice caused to the right holder by the infringement.

2. In the case provided for in paragraph 1, point (b), Member States may provide for the recovery, for the benefit of the right holder, of all the profits made by the infringer which are attributable to that infringement and which are not taken into account when calculating the compensatory damages.

For calculating the amount of the profits made by the infringer, the right holder is bound to provide evidence only with regard to the amount of the gross income achieved by the infringer, with the latter being bound to provide evidence of his deductible expenses and profits attributable to factors other than the protected object.
Article 18

Legal costs

Member States shall lay down that the legal costs, lawyer's fees and any other expenses incurred by the successful party shall be borne by the other party, unless equity or the economic situation of the other party does not allow this. The responsible authorities shall determine the sum to be paid.

SECTION 7

PUBLICITY MEASURES

Article 19

Publication of judicial decisions

1. Member States shall lay down that, in legal proceedings instituted for infringement of an intellectual property right, the judicial authorities may order, at the request of the right holder and at the expense of the infringer, that the decision be displayed and published in full or in part in the newspapers designated by the right holder.

2. Member States may also provide for other publicity measures which are appropriate to the particular circumstances.

CHAPTER III

CRIMINAL LAW PROVISIONS

Article 20

Criminal law provisions

1. Member States shall ensure that all serious infringements of an intellectual property right, as well as attempts at, participation in and instigation of such infringements, are treated as a criminal offence. An infringement is considered serious if it is intentional and committed for commercial purposes.

2. Where natural persons are concerned, Member States shall provide for criminal sanctions, including imprisonment.

3. As regards natural and legal persons, the Member States shall provide for the following sanctions:

(a) fines;
(b) confiscation of the goods, instruments and products stemming from the offences referred to in paragraph 1, or of goods whose value corresponds to those products.

In appropriate cases, Member States shall also provide for the following sanctions:

(a) destruction of the goods infringing an intellectual property right;

(b) total or partial permanent or temporary closure of the establishment used primarily to commit the infringement;

(c) a permanent or temporary ban on engaging in commercial activities;

(d) placing under judicial supervision;

(e) judicial winding-up;

(f) a ban on access to public assistance or subsidies;

(g) publication of judicial decisions.

4. For the purposes of this Chapter, the term “legal person” shall be understood to mean any legal entity having such status under the applicable national law, except for States or any other public bodies acting in the exercise of their prerogative of public power, as well as public international organisations.

CHAPTER IV

TECHNICAL MEASURES

Article 21

Legal protection of technical devices

1. Without prejudice to particular provisions applicable in the field of copyright, related rights and the sui generis right of the creator of a database, Member States shall provide for appropriate legal protection against the manufacture, import, distribution and use of illegal technical devices.

2. For the purposes of this Chapter,

(a) “technical device” means any technology, device or component which, in the normal course of its functioning, is designed for the manufacture of authentic goods and the incorporation therein of elements which are manifestly identifiable by customers and consumers and which make it easier to recognise the goods as being authentic.

(b) “illegal technical device” means any technical device which is designed to circumvent a technical device which permits the manufacture of goods
infringing industrial property rights and incorporating the manifestly identifiable elements described in point (a).

**Article 22**

**Codes of conduct**

1. Member States shall encourage:

   (a) the development by trade or professional associations or organisations of codes of conduct at Community level aimed at contributing towards the enforcement of the intellectual property rights referred to in Article 2;

   (b) the establishment, by optical disc manufacturers and the professional organisations concerned, of codes of conduct aimed at helping manufacturers to combat infringements of intellectual property, particularly by recommending the use on optical discs of a source code enabling the identification of the origin of their manufacture;

   (c) the submission to the Commission of draft codes of conduct at national and Community level and of any evaluations of the application of these codes of conduct.

2. The codes of conduct must be in accordance with Community law and notably the rules on competition and protection of personal data.

**CHAPTER V**

**ADMINISTRATIVE COOPERATION**

**Article 23**

**Assessment**

1. Three years after the date laid down in Article 26(1), each Member State shall submit to the Commission a report informing it of the situation with regard to implementation of this Directive.

   On the basis of those reports, the Commission shall draw up a report on the application of this Directive, including an assessment of the effectiveness of the measures taken by the various competent bodies and instances, as well as an evaluation of its impact on innovation and the development of the information society. That report shall then be transmitted to the European Parliament, the Council and the European Economic and Social Committee. It shall be accompanied, if necessary, by proposals for amendments to this Directive.

2. Member States shall provide the Commission with all the aid and assistance it may need when drawing up the report referred to in the second subparagraph of paragraph 1.
Article 24

Correspondents

1. Each Member State shall designate one or more correspondents (referred to hereinafter as “the national correspondents”) for any question relating to the implementation of the measures provided for by this Directive. It shall communicate the details of the correspondent(s) to the other Member States and to the Commission.

2. For the purposes of applying this Directive, the Member States shall co-operate with the other Member States and with the Commission via the national correspondents. They shall provide the assistance and information requested by the other Member States or the Commission as rapidly as possible, including by appropriate electronic means.

CHAPTER VI

FINAL PROVISIONS

Article 25

Implementation

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive not later than eighteen months after the date of its adoption. They shall immediately inform the Commission thereof.

When Member States adopt these provisions, these shall contain a reference to this Directive or shall be accompanied by such reference at the time of their official publication. The procedure for such reference shall be adopted by Member States.

2. Member States shall communicate to the Commission the texts of the provisions of national law which they adopt in the field governed by this Directive.

Article 26

Entry into force

This Directive shall enter into force on the twentieth day following its publication in the Official Journal of the European Union.
Article 27

Addressees

This Directive is addressed to the Member States.

Done at Brussels, […]

For the European Parliament
The President
[…]

For the Council
The President
[…]

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ANNEX

List of provisions of Community and European law relating to the protection of intellectual property, referred to in Article 1(3)


Council Regulation (EEC) No 1576/89 of 29 May 1989 laying down general rules on the definition, description and presentation of spirit drinks\(^3\).

Commission Regulation (EEC) No 1014/90 of 24 April 1990 laying down detailed implementing rules on the definition, description and presentation of spirit drinks\(^4\).


Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property\(^6\).

Council Directive 93/83/EEC of 27 November 1993 on the coordination of certain rules concerning copyright and rights relating to copyright applicable to satellite broadcasting and cable retransmission\(^7\).


Council Regulation (EC) No 1493/99 of 17 May 1999 on the common organisation of the market in wine\(^12\).

\(^1\) OJ L 24, 27.1.1987, p. 36.
\(^6\) OJ L 346, 27.11.1992, p. 61.
\(^7\) OJ L 248, 6.10.1993, p. 15.


Council Regulation (EEC) No 1768/92 of 18 June 1992 concerning the creation of a supplementary protection certificate for medicinal products\textsuperscript{15}.


Council Regulation (EEC) No 2081/92 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs, as last amended by Regulation (EC) No 1068/97\textsuperscript{17}.

Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark\textsuperscript{18}.

Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights\textsuperscript{19}.


\begin{footnotesize}
\begin{enumerate}
\item OJ L 167, 22.6.2001, p. 10.
\item OJ L 272, 13.10.2001, p. 32.
\item OJ L 182, 2.7.1992, p. 1.
\end{enumerate}
\end{footnotesize}
FINANCIAL STATEMENT

1. TITLE OF OPERATION
Proposal for a Directive of the European Parliament and of the Council on measures and procedures to ensure the enforcement of intellectual property rights.

2. BUDGETARY HEADING INVOLVED
A0-7030.

3. LEGAL BASIS
Article 95 of the EC Treaty.

4. DESCRIPTION OF OPERATION
4.1 General objective
The objective of the operation is to harmonise the legislation of the Member States on the means of enforcing intellectual property rights in the Internal Market and to establish a general framework for the exchange of information and administrative cooperation.

4.2 Period covered and arrangements for renewal
Indefinite period.

5. CLASSIFICATION OF EXPENDITURE/REVENUE
5.1 NCE (non-compulsory expenditure)
5.2 DA (differentiated appropriation)
5.3 Type of revenue involved: (none)

6. TYPE DE OF EXPENDITURE/REVENUE

7. FINANCIAL IMPACT (PART B)

8. FRAUD PREVENTION MEASURES

9. ELEMENTS OF COST-EFFECTIVENESS ANALYSIS
9.1 Specific and quantified objectives; target population
9.2 Grounds for the operation

The proposal for a Directive is intended to harmonise the national legislation on the means of enforcing intellectual property rights. There are major disparities in the Member States' systems of penalties in this field. This situation is prejudicial to the proper functioning of the Internal Market.

Proper application of the Directive involves setting up a Contact Committee made up of correspondents designated by the Member States and chaired by a representative of the Commission. The expenditure involved in the operation of this Committee will be borne by the Community budget.

9.3 Monitoring and evaluation of the operation

Pursuant to Article 23 of the proposal for a Directive, the Commission will publish a report on the implementation of the Directive three years after its transposition by Member States.

10. ADMINISTRATIVE EXPENDITURE (PART A OF SECTION III OF THE GENERAL BUDGET)

10.1 Effect on the number of posts

<table>
<thead>
<tr>
<th>Type of post</th>
<th>Staff to be assigned to managing the operation</th>
<th>Source</th>
<th>Duration</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Permanent posts</td>
<td>Temporary posts</td>
<td></td>
</tr>
<tr>
<td>Officials or temporary staff</td>
<td>A</td>
<td>B</td>
<td>C</td>
</tr>
<tr>
<td>Other resources</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>


10.2 Overall financial impact of human resources (in EUR)

<table>
<thead>
<tr>
<th></th>
<th>Amounts</th>
<th></th>
<th>Permanent posts</th>
</tr>
</thead>
<tbody>
<tr>
<td>Officials or temporary</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>staff</td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>A</td>
<td>-</td>
<td></td>
<td></td>
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<tr>
<td>B</td>
<td>-</td>
<td></td>
<td></td>
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<tr>
<td>C</td>
<td>-</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Other resources (give</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>budget heading)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

10.3 Increase in other administrative expenditure as a result of the operation, especially costs relating to meetings of committees and groups of experts (in EUR)

<table>
<thead>
<tr>
<th>Budget heading (number and heading)</th>
<th>Amounts</th>
<th>Method of calculation</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>EUR 9 100</td>
<td>14 x EUR 650 (travel expenses of national correspondents)</td>
</tr>
<tr>
<td>A0-7030</td>
<td>x 2</td>
<td>x 2</td>
</tr>
<tr>
<td>Total</td>
<td>EUR 18 200</td>
<td></td>
</tr>
</tbody>
</table>

The amounts indicate the total cost of the additional posts for fixed-length operations and the cost over 12 months for operations the duration of which is not fixed.

The requirements in terms of human and administrative resources will be encompassed by the amount allocated to DG MARKT under the annual allocation procedure.

If the Commission decides to create a Contact Committee, the latter's remit will be to develop cooperation, to foster the exchange of information, to supervise the functioning of this Directive and to examine, at the request of the Commission or of a representative of a Member State, all questions relating to the implementation of the means of enforcing intellectual property rights in the Internal Market. It will also assist the Commission in drawing up the assessment report.

This Committee will not be governed by the comitology procedure set out in Council Decision 1999/468/EC. The only annual costs of this Committee will be the travelling expenses of the national correspondents.
IMPACT ASSESSMENT FORM

THE IMPACT OF THE PROPOSAL ON BUSINESS, WITH SPECIAL REFERENCE TO SMALL AND MEDIUM-SIZED ENTERPRISES (SMEs)

TITLE OF PROPOSAL

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

REFERENCE NO

COM(2003) 46 final

THE PROPOSAL

1. Taking account of the principle of subsidiarity, why is Community legislation necessary in this area and what are its main aims?

Businesses have expressed the need to have means of enforcing intellectual property rights which are equally effective in all Member States. This need is also in line with the objectives of the Commission's policy aimed at fostering the development of innovation and creativity, in particular through coherent and effective protection of intellectual property in the Internal Market. However, it is clear that this need cannot be met by action taken by each Member State individually. That is why harmonisation at Community level of the legislation of the Member States on the means of enforcing intellectual property rights is necessary. To be genuinely effective, harmonisation must be sought on the basis of the national provisions which seem the most suited to satisfy the needs of parties infringed against whilst taking into account the legitimate rights of defence.. This will make it possible to enforce intellectual property rights in a way which is equivalent and effective throughout the Community.

THE IMPACT ON BUSINESS

2. Who will be affected by the proposal?

– Which sectors of business?

In principle, all sectors are affected by compliance with intellectual property.

– Which sizes of business (what is the concentration of small and medium-sized firms)?

The means of enforcing intellectual property concern both large and small businesses, in particular those active in the field of creation and innovation. SMEs are especially vulnerable to counterfeit and pirated products. Their limited financial resources frequently do not allow them to incur high legal costs.
– Are there particular geographical areas of the Community where these businesses are found?

The entire territory of the Community is concerned.

3. What will business have to do to comply with the proposal?

The means of enforcing intellectual property rights must be made available to businesses by the Member States. Businesses will be able to invoke those means when defending the intellectual property rights of which they are the holders.

4. What economic effects is the proposal likely to have:

– on employment?

It is accepted that, in the final analysis, the damage suffered by businesses because of infringements of intellectual property affects the number of jobs they provide, although the precise effect of those infringements on employment in industry is difficult to measure. According to a study conducted in the European Union in June 2000, more than 17 000 jobs were said to be lost each year because of counterfeiting and piracy. According to a survey carried out in France in 1998, the number of jobs lost through counterfeiting was put at some 38 000 for France. Harmonisation on the basis of those national provisions shown to be most effective will make it possible to improve and step up the fight against counterfeiting and piracy, and hence improve the employment situation in the Community.

– on investment and the creation of new businesses?

Harmonisation of national legislation on the means of enforcing intellectual property rights will allow businesses to benefit from an equivalent level of protection throughout the Community. This favourable environment will boost business confidence in the Internal Market when developing their creative and innovative activities. This situation will ensure that they obtain an equitable return on their investment in research and development and will encourage them to invest.

– on the competitive position of businesses?

Innovation is of paramount importance for the competitiveness of businesses. They constantly have to improve or renew their products if they wish to maintain or conquer market shares. Sustained innovative activity leading to the development of new products or services places businesses at an advantage on the market and is a major factor in their competitiveness. For them to be able to innovate under good conditions, businesses must benefit from an environment conducive to the exercise of their activities, with particular regard to the protection of intellectual property. Harmonisation of national legislation on the means of enforcing intellectual property rights will help to ensure the development of the innovatory activity of businesses in the Internal Market, and hence their competitiveness.

5. Does the proposal contain measures to take account of the specific situation of small and medium-sized firms (reduced or different requirements, etc.)?

The proposal does not contain specific measures for small and medium-sized firms. Nevertheless, the harmonisation proposed should also benefit SMEs by providing
them with effective means of enforcing their intellectual property rights and making it easier for them to access the judicial decisions published in the Member States relating to intellectual property. This will also make it possible to lower the costs involved in enforcing the intellectual property rights held by SMEs.

**CONSULTATION**

6. List the organisations which have been consulted about the proposal and outline their main views.

The proposal itself was not distributed to interested circles, since it still has to be adopted by the Commission. However, the need for Commission action in this field was identified during a prior consultation process. In October 1998 the Commission published a Green Paper on the fight against counterfeiting and piracy in the Single Market (COM(98) 569 final)¹. It received nearly 145 written contributions from all the interested circles. These were the subject of a summary report which was published². The European Parliament³ and the Economic and Social Committee⁴ also had occasion to comment on the Green Paper. In addition, the Commission organised, jointly with the German Presidency of the Council of the European Union, a hearing open to all interested circles on 2 and 3 March 1999 in Munich⁵, as well as a meeting of experts from the Member States of the Community on 3 November 1999, with a view to gathering their views on the subject. Finally, the Commission presented a follow-up Communication to the Green Paper on 30 November 2000, in which it announced, in the form of an action plan, a whole series of measures intended to step up and improve the fight against counterfeiting (COM(2000) 789 final)⁶, including a proposal for a Directive intended to strengthen the means of enforcing intellectual property rights.

During the consultation, the participants were unanimous in underlining the lack of deterrent effect of the present means and reported the same weaknesses, i.e. that the damages awarded, the fines and other penalties handed down were too little and not enough to deter. The disparities between the national systems of penalties were also raised as an obstacle to effectively combating counterfeiting and piracy in the Internal Market. The interested circles expressed the desire for the penalties and other means of enforcing intellectual property rights to be equally effective in all Member States, in particular with regard to searching, seizure and evidence. Attention was also drawn to the length and uncertain nature of the national measures and procedures. Most of the comments called for legislative, judicial and administrative action, strengthened and harmonised at the level of the EU and its Member States, to be taken rapidly in this field.

¹ Cf. footnote 1.
² Cf. footnote 2.
³ Cf. footnote 5.
⁴ Cf. footnote 4.
⁵ Cf. footnote 3.
⁶ Cf. footnote 6.
The Commission's follow-up Communication, and in particular the announcement of a proposal for a Directive on the enforcement of intellectual property rights, was welcomed by interested circles. In its supplementary opinion of 30 May 2001\(^7\), the Economic and Social Committee approved the intention of the European Commission to present a proposal for a Directive on this subject in the near future.

\(^7\) Cf. footnote 7.
OUTCOME OF PROCEEDINGS

of: Working Party on Intellectual Property
on: 3 June 2003
No. Cion prop.: 6777/03 PI 19 CULT 17 CODEC 204
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

Following a presentation by the Commission representative of the proposed Directive, the Working Party had a first exchange of general views and examined Articles 1 to 6. The results of the discussion on Articles 1 to 6 are set out in 11107/03 ADD 1.

Several delegations welcomed the proposed Directive and indicated their strong wish for rapid progress.

As internal consultations in some Member States had not yet been concluded, a number of delegations entered a general scrutiny reservation.

For IT, the proposed Directive should go beyond what is already provided by TRIPS. In particular, it should contain:

- rules on the emergency seizure of the alleged infringer's assets, irrespective of the Member State in which the latter are found;
provisions on recognition and enforcement of a national court's rulings in all Member States;

- measures adapted to the fight against Internet-based piracy;

- rules on administrative sanctions against infringers.


Twelve delegations (F, A, UK, ES, S, FIN, D, NL, IRL, P, DK, IT) were of the view that Article 20 (Criminal law provisions) falls under the third pillar and therefore should be removed from the present Directive. COM argued that Article 20 had been inserted in the Directive for the sake of completeness and that it did not aim at harmonising criminal sanctions.

S questioned the appropriateness of not differentiating in the Directive between good faith and bad faith infringers.

ES expressed the view that the Directive should provide for practical administrative measures alongside the measures provided under Articles 10, 11 and 15.

P and IT stressed the need for caution in trying to harmonise civil proceedings in Member States, as these are closely linked to the judicial set-up of each Member State.

IT voiced concerns about Article 17 (Damages).

Finally, in reply to HU, COM undertook to present the results of the study "Counting Counterfeits"¹ at the next meeting of the Working Party.

COUNCIL OF THE EUROPEAN UNION

Interinstitutional File: 2003/0024 (COD)

Brussels, 3 July 2003

11107/03 ADD 1
LIMITE
PI 66

ADDENDUM TO OUTCOME OF PROCEEDINGS

of: Working Party on Intellectual Property
on: 3 June 2003

No. Cion prop.: 6777/03 PI 19 CULT 17 CODEC 204

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
CHAPTER I

OBJECTIVE AND SCOPE

Article 1

Subject-matter
This Directive concerns the measures\(^1\) necessary to ensure the enforcement of intellectual property rights.\(^2\)

Article 2

Scope\(^3\)

1. Without prejudice to the means which are or may be provided for in Community or national legislation, in so far as those means may be more favourable for right holders, the measures provided for by this Directive shall apply to any infringement of the rights deriving from Community and European acts on the protection of intellectual property, as listed in the Annex,\(^4\) and from the provisions adopted by the Member States in order to comply with those acts when the infringement is committed for\(^5\) commercial purposes or causes significant harm to the right holder.\(^6\)\(^7\)

---

\(^1\) D observed that the draft Directive uses indiscriminately the terms "measures" or "measures and procedures" in different Articles and requested that "measures" be used throughout the Directive.

\(^2\) IT observed that under the current wording of Article 2, not all intellectual property rights are covered by the proposed Directive. The wording of Articles 1 and 2 needs therefore to be aligned.

\(^3\) IT requested that the scope of the proposed Directive be extended to cover the enforcement of all intellectual property rights, irrespective of whether these stem from national, European or Community law.

\(^4\) NL, IRL: reservation on the insertion of the Convention on the Grant of European Patents (EPC), which is not a Community instrument, in the Annex. According to COM, this is linked to future developments relating to Community Patents.

\(^5\) B: insert "direct or indirect".

\(^6\) F, P, A, D, IT, ES, HU: reservation on "when the infringement is committed for commercial purposes or causes significant harm to the right holder", which restricts too much the scope of the Directive as regards copyright infringements, especially over computer networks. For COM, the latter could be covered by the term "significant harm". UK, FIN and HU also expressed concerns about the appropriateness of applying the same measures for both copyright and industrial property rights.

\(^7\) UK, NL: need to clarify what is meant by "commercial purposes" and "significant harm".
2. This Directive shall be without prejudice to the particular provisions on the enforcement of rights contained in Community legislation concerning copyright\(^8\) and notably those found in Directive 2001/29/EC.

3. This Directive shall not affect\(^9\):
   a) the Community provisions governing the substantive law on intellectual property, Directive 95/46/EC, Directive 1999/93/EC or Directive 2000/31/EC;\(^{10}\)
   b) Member States’ international obligations and notably the Agreement on Trade-Related Aspects of Intellectual Property Rights (the “TRIPS Agreement”).

CHAPTER II

MEASURES AND PROCEDURES

SECTION 1

GENERAL PROVISIONS

Article 3

General obligation\(^{11}\)

Member States shall provide for the proportionate measures and procedures needed to ensure the enforcement of the intellectual property rights covered by this Directive.

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\(^{8}\) B: insert "and related rights".

\(^{9}\) D observed that one uses "without prejudice" in paragraph 2 and "shall not affect" in paragraph 3 and requested that the two paragraphs be aligned.

\(^{10}\) A, D suggest adding references to Directive 98/84/EC (conditional access) and more recent Community legislation on data protection.

\(^{11}\) IT observed that Article 3 is equivalent in substance to Article 41 TRIPS. The only additional element of this Article is the first sentence of the second subparagraph, but this sentence should be deleted as superfluous.
These measures and procedures shall be such as to remove from those responsible for an infringement of an intellectual-property right the economic benefits of that infringement. They shall be fair and equitable, and shall not be unnecessarily complicated or costly, nor entail unreasonable time-limits or unwarranted delays.

These measures and procedures shall be applied in such a manner as to avoid the creation of barriers to legitimate trade.

Article 4

Penalties

Member States shall ensure that any infringement of an intellectual property right covered by Article 2 is punishable by penalties. These penalties must be effective, proportionate and deterrent.

Article 5

Persons entitled to apply for the application of the measures and procedures

1. Member States shall recognise as persons entitled to apply for application of the measures referred to in this Chapter the holders of intellectual property rights, as well as all other persons authorised to use those rights in accordance with the applicable law, or their representatives.

2. Member States shall confer upon rights management or professional defence bodies, wherever they represent intellectual property right holders or other persons authorised to use these rights according to the applicable law, an entitlement to seek application of the measures and procedures referred to in this Chapter, including the authority to initiate legal proceedings for the defence of those rights or of the collective or individual interests for which they are responsible.

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12 A, D, NL: concerns that the first sentence of the second subparagraph of Article 3 contradicts Article 17(2).
13 D, NL, A, UK: reservation on the term "penalties", which is traditionally used in the field of criminal law.
14 IT: Reservation on Article 4, on the grounds that as a rule on substantive intellectual property law it does not fit in the proposed Directive.
15 A, NL: not all licensees but only those having an exclusive licence should be entitled to apply for application of the measures referred to in the Directive to persons. For GR, licensees should be entitled to initiate proceedings only if they have received a special authorisation by the rightholder.
16 In reply to UK, COM explained that "or their representatives" means any other person having a special authorisation to initiate proceedings provide for by the Directive. IT wondered whether this term does not cover also Article 5(2).
17 FIN, D, IT, S: reservation on Article 5(1) on the grounds that it is too vague.
18 P requested clarification of the first subparagraph of paragraph 2.
Such entitlement shall be accorded to any properly constituted rights management body or professional defence body, regardless of the Member State in which it is established.\textsuperscript{19}

The first and second subparagraphs shall be without prejudice to the applicable rules on the representation of parties in court proceedings.\textsuperscript{20,21}

\textit{Article 6}

\textbf{Presumption of copyright tenure}\textsuperscript{22}

Until proved otherwise, authorship of a work shall be presumed to be vested in the person whose name, presented as being that of the author, is featured on copies of the work, or whose authorship is referred to on a copy of the work by way of a statement, label or other mark.\textsuperscript{23,24}

\begin{footnotesize}
\begin{enumerate}
\item IT: scrutiny reservation on this provision.
\item IT: reservation on the need for the last subparagraph of Article 5(2).
\item A, DK, NL, FIN, S, GR: reservation on Article 5(2). P shares this reservation to the extent that this provision goes beyond TRIPS standards. F, UK strongly support this Article.
\item NL: doubts need for this Article in the light of Article 15 of the Berne Convention. DK requested deletion of this provision, on the grounds that it is a provision of substantive intellectual property law. COM and HU insisted on the need for this provision in the Directive.
\item ES seeks clarification that this provision concerns not only physical copies of a work.
\item A, HU suggest that this provision should concern not only authors but also holders of rights related to copyright.
\end{enumerate}
\end{footnotesize}
OUTCOME OF PROCEEDINGS

of: Working Party on Intellectual Property
on: 16 July 2003

No. prev. doc.: 11107/03 PI 66 + ADD 1
No. Cion prop.: 6777/03 PI 19 CULT 17 CODEC 204

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

The Working Party continued the Article by Article examination of the proposed Directive (doc. 6777/03), examining Articles 7 to 11 and 17. The results of this discussion are set out in 12055/03 ADD 1.

F, LUX, FIN, B, S and DK maintained their general scrutiny reservation on the proposed Directive.

F entered also a parliamentary scrutiny reservation.

The Working Party also took note of an oral presentation by the Commission of the results of its study "Counting Counterfeits: Defining a method to collect, analyse and compare data on counterfeiting and piracy in the Single Market".
COUNCIL OF THE EUROPEAN UNION

Interinstitutional File:
2003/0024 (COD)

Brussels, 21 August 2003

12055/03
ADD 1
LIMITE
PI 73
CODEC 1092

ADDENDUM TO OUTCOME OF PROCEEDINGS

of: Working Party on Intellectual Property
on: 16 July 2003

No. prev. doc.: 11107/03 PI 66 + ADD 1
No. Cion prop.: 6777/03 PI 19 CULT 17 CODEC 204

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
SECTION 2

EVIDENCE

Article 7

Evidence

1. Member States shall lay down that, where a party has presented reasonably accessible evidence sufficient to support its claims, and has, in substantiating those claims, cited evidence which is to be found under the control of the opposing party, the judicial authorities may\(^1\) order that such evidence be produced by the opposing party, subject to the protection of confidential information.\(^2\)

2. In order to identify and prosecute the real beneficiaries of the infringement, Member States shall take such measures as are necessary to enable the responsible authorities to order the communication or seizure of banking, financial or commercial documents, subject to the protection of confidential information.\(^3\)

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1. F: insert "at the request of the former party".
2. In reply to questions to the scope of this provision, COM explained that Article 7(1) is intended to apply to civil law proceedings and to cover both proceedings for provisional or precautionary measures and proceedings on the merits of the case. Nothing, however, prevents Member States from extending its application to criminal law proceedings if they so wish, as the proposed Directive is a minimum harmonisation Directive.
3. D, DK, NL, IT, F, LUX, A, UK, P, FIN, B, S: reservation on paragraph 2, on the grounds that it deals with issues ("seizure") falling into the ambit of criminal law, its scope ("real beneficiaries of the infringement") is too broad and open-ended and does not respect the proportionality principle. IRL: scrutiny reservation on paragraph 2.
Article 8

Measures for protecting evidence

1. Member States shall lay down that, where there is a demonstrable risk that evidence may be destroyed even before the commencement of proceedings on the merits of the case, the judicial authorities may, in the event of an actual or imminent infringement of an intellectual property right, authorise in any place either the detailed description, with or without the taking of samples, or the physical seizure of the infringing goods, and, in appropriate cases, the documents relating thereto. These measures shall be taken by order issued on application, if necessary without the other party having been heard.

Where evidence-protection measures have been adopted without the other party having been heard, the affected parties shall be given notice immediately after the execution of the measures at the latest. A review, including a right to be heard, shall take place upon request of the affected parties with a view to deciding, within a reasonable period after the notification of the measures, whether the measures shall be modified, revoked or confirmed.

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4 A, D: general scrutiny reservation on Article 8.
5 B, F, D, ES: reservation on "where there is a demonstrable risk that evidence may be destroyed even before the commencement of proceedings on the merits of the case".
6 B, F: need to state explicitly in paragraph 1 that the aim of the measures provided for by Article 8(1) is to establish that an infringement has taken place.
7 Several delegations questioned the need for (or the appropriateness of) the term "in any place". COM will reflect further on the possible deletion of this term. In any case, COM pointed out that this term should not be interpreted as enabling a court in a Member State to order a description or a seizure of goods situated within the territory of another Member State.
8 DK, P, ES: reservation on "physical seizure".
9 A, B: the term "infringing goods" is not accurate and needs to be further refined. COM will reflect on alternative wording.
10 B, FIN: specify that the descriptions and/or seizures will have to be carried out by independent experts.
11 GR: reservation on "if necessary without the other party having been heard". For ES, such a possibility should be available only if the defendant has been invited to the hearing and has failed to appear before the court. S and FIN observed that under the current wording Member States remain free to decide under which circumstances the evidence protection measures can be adopted without the other party having been heard. COM will reflect on the need for this possibility.
12 ES, NL, UK: reservation on the first subparagraph of Article 8(1), which should be clearer, less detailed and should leave more freedom to Member States to decide on the appropriate measures. For UK, it is necessary to ensure that this provision does not have negative implications on Human Rights.
13 IT: need to specify that a review shall be available in any case, namely even if the evidence-protection measures have been adopted after having heard the other party.
2. Member States shall lay down that physical seizure may be subject to the applicant’s lodging of an adequate guarantee intended to ensure compensation for any prejudice suffered by the defendant if the proceedings instituted against him are subsequently judged to be unfounded.\textsuperscript{14}

3. Member States shall lay down that, if the applicant has not instituted legal proceedings leading to a decision on the merits of the case within 31 calendar days\textsuperscript{15} of the seizure, the seizure shall be null and void\textsuperscript{16}, without prejudice to the damages which may be claimed.\textsuperscript{17}

Where the evidence protection measures have been revoked, or where they lapse owing to any act or omission by the applicant, or where it is subsequently found that there has been no infringement of any intellectual property right, the judicial authorities shall have be empowered to order the applicant, at the defendant’s request, to provide the defendant with adequate compensation for any injury caused by the measures.

\textsuperscript{14} ES: expand the scope of paragraph 2 to cover any evidence protection measure and not only physical seizure.

\textsuperscript{15} B, D, NL: 31 days can be too short in some cases. B, NL: national courts should be free to fix a longer period where appropriate, along the lines of Article 50(6) TRIPS. For UK, 31 days should be the maximum and Member States should be able to set a shorter period where appropriate. IT: replace "31" by "30". ES suggested that "31 calendar days" be replaced by "a reasonable period" and the whole issue be left to national courts. COM will reflect on how best to align the wording of paragraph 3 with Article 50(6) TRIPS.

\textsuperscript{16} F: scrutiny reservation on whether the seizure should be null and void after the 31 calendar days.

\textsuperscript{17} ES: expand the scope of this provision to cover any evidence protection measure and not only physical seizure.
SECTION 3

RIGHT OF INFORMATION

Article 9

Right of information\(^{18}\)

1. Member States shall lay down\(^{19}\) that, in order to deal with proceedings involving an infringement of an intellectual property right, or in response to a request for provisional or precautionary measures, the judicial authorities shall order, at the request of the right holder\(^{20}\), unless particular reasons are invoked for not doing so, any person\(^{21}\) to provide information on the origin of the goods or services which are thought to infringe an intellectual property right and on the networks for their distribution or provision\(^{22}\), respectively, if that person:

(a) was found in possession, for commercial purposes\(^{23}\), of the infringing goods;

(b) was found to be using\(^{24}\) the infringing services\(^{25}\) for commercial purposes; or

(c) was indicated by the person referred to in point (a) or (b) as being at the origin of the goods or services or as being a link in the network for distributing those goods or providing those services.\(^{26,27}\)

---

\(^{18}\) UK: reservation on Article 9, on the grounds that it is too detailed. Need for explicit reference to Human Rights and for ensuring that the appropriate balance between the latter and the need to combat piracy has been struck. COM pointed out that such reference is already made in recital 30. Scrutiny reservation on Article 9: P, LUX. A: in favour of principle of Article 9, scrutiny reservation on drafting.

\(^{19}\) ES: replace "shall lay down" by "may lay down".

\(^{20}\) IT, D, ES: consider adding to the right holder the persons referred to in Article 5. COM prepared to look positively at this suggestion.

\(^{21}\) NL, D, LUX, B, ES, P: reservation on the appropriateness of obliging persons other than parties to infringement proceedings to provide information, in particular before it has been established that an infringement has taken place.

\(^{22}\) ES: add a reference to the production of the goods or services.

\(^{23}\) IT: add a reference to "economic purposes", in connection with Internet sales.

\(^{24}\) LUX: replace "using" by "providing".

\(^{25}\) A: refine further the terms "infringing goods" and "infringing services".

\(^{26}\) NL, UK, S: question whether paragraph 1(b) and (c) are in line with Directive 2000/31/EC on electronic commerce.

\(^{27}\) F, P: reservation on the criminal law implications of Article 9(1).
2. The information referred to in paragraph 1 shall comprise:

(a) the names and addresses of the producers, distributors, suppliers and other previous holders of the product or service, as well as the intended wholesalers and retailers;

(b) information on the quantities produced, delivered, received or ordered, as well as the price obtained for the goods or services in question.²⁸ ²⁹

3. Paragraphs 1 and 2 shall apply³⁰ without prejudice to other provisions which:

(a) grant the right holder rights to receive fuller information;

(b) govern the use in civil or criminal proceedings of the information communicated pursuant to this Article;

(c) govern responsibility for misuse of the right of information; or

(d) afford an opportunity for refusing to provide information which would force the person referred to in paragraph 1 to admit to the existence of an infringement of an intellectual property right.

4. Apart from the cases referred to in paragraph 1, Member States shall lay down that, when the responsible authorities³¹ are in possession of the information referred to in paragraph 2, they may so inform the right holder, provided the latter is known, while complying with the rules on the protection of confidential information, in order to allow the right holder to institute proceedings leading to a decision on the merits of the case or to obtain provisional or precautionary measures.³²

²⁸ D, S: questions on absence of sanctions for providing false information. COM: in case of false information, it will be up to Member States to set the appropriate penalties.

²⁹ NL: scrutiny reservation on paragraph 2(b), which goes beyond the scope of paragraph 1.

³⁰ Several delegations indicated that their positions on paragraphs 2, 3 and 4 would depend on the final outcome of discussions on paragraph 1.

³¹ In reply to questions as to which authorities were intended, COM indicated that this would be for each Member State to determine. ES indicated its intention of submitting a drafting proposal on cooperation between the various authorities concerned; COM drew attention to Article 24 of the proposal.

³² F, B, IT: reservation on paragraph 4, concerning the potential liability of the competent authorities if the goods or services concerned prove not to be infringing.
SECTION 4

PROVISIONAL AND PRECAUTIONARY MEASURES\textsuperscript{33 34}

Article 10

Provisional measures\textsuperscript{35}

1. Member States shall lay down that the judicial authorities may serve the alleged infringer, or the intermediary\textsuperscript{36} whose services are being used by a third party to infringe a right, with an interlocutory injunction intended to prevent any impending infringement of an intellectual property right, or to forbid, on a provisional basis and subject to a recurrent fine, the continuation of the alleged infringements of an intellectual property right, or to make such continuation subject to the lodging of guarantees intended to ensure the compensation of the right holder.

The judicial authorities shall be empowered to require the applicant to provide any reasonably available evidence in order to satisfy themselves with a sufficient degree of certainty that the applicant is the right holder and that the applicant’s right is being infringed or, that such infringement is imminent.\textsuperscript{37}

2. Member States shall lay down that the provisional measures referred to in paragraph 1 may in appropriate cases be taken without the defendant having been heard, in particular when any delay would cause irreparable prejudice to the right holder. In the event of this happening, the defendant shall be so informed without delay after the execution of the measures.\textsuperscript{38}

A review, including the right to be heard, shall take place at the request of the defendant in order to decide, within a reasonable time after notification of the measures, whether they are to be amended, revoked or confirmed.

\textsuperscript{33} IT: will circulate new draft provision, to be inserted in Section 4, addressing infringements carried out through the Internet.

\textsuperscript{34} ES, NL, P: specify in the text that the measures referred to in Section 4 may only be ordered at the parties' request.

\textsuperscript{35} ES: reservation on Article 10, courts should be left free to provide which provisional measures they deem necessary.

\textsuperscript{36} D, UK, ES, NL: reservation on the inclusion of intermediaries in this provision. According to COM, there is no contradiction between Article 10(1) and Articles 12 to 14 of the E-commerce Directive (OJ L 178, 17.7.2000, p. 1).

\textsuperscript{37} IT, D: reservation on second subparagraph of Article 10(1).

\textsuperscript{38} LUX: reservation on paragraph 2.
3. Member States shall lay down that a prohibitory measure shall be revoked if the applicant does not institute proceedings leading to a decision on the merits of the case within thirty-one calendar days from the day on which the right holder became aware of the facts on which it is based.\(^\text{39}\)

4. The judicial authorities may make the prohibition subject to the lodging by the applicant of adequate guarantees intended to ensure any compensation of the prejudice suffered by the defendant if the proceedings on the merits are subsequently judged to be unfounded.

5. Where the provisional measures have been revoked or where they lapse due to any act or omission by the applicant, or where it is subsequently found that there has been no infringement or threat of infringement of an intellectual property right, the judicial authorities shall have been empowered to order the applicant, at the request of the defendant, to provide the defendant adequate compensation for any injury caused by these measures.

\textit{Article 11}

\textbf{Precautionary measures}\(^\text{40}\)

1. The Member States shall lay down that, in appropriate cases, and in particular if the injured party demonstrates circumstances likely to threaten the recovery of damages, and if necessary without the other party having been heard, the judicial authorities may authorise the precautionary seizure of the fixed and non-fixed assets of the infringer, including the blocking of his bank accounts and other assets.\(^\text{41}\)

In order to ensure the implementation of the provisions set out in the first paragraph, Member States shall also take the necessary steps to allow the judicial authorities to order the communication or seizure of bank, financial or commercial documents.\(^\text{42}\)

\(^{39}\) \textit{ES, NL}: similar remarks as on Article 8(3), first subparagraph. \textit{ES}: the period should run from the date on which the provisional measures were adopted. \textit{NL, A}: this paragraph should apply only at the request of the defendant. \textit{COM} prepared to look positively at these suggestions.

\(^{40}\) \textit{IT, NL, S}: reservation on Article 11, courts should be left free to decide which precautionary measures they deem necessary.

\(^{41}\) \textit{IT, NL}: reservation on the first subparagraph of Article 11(1), on the grounds that it is too permissive. \textit{LUX}: scrutiny reservation on blocking of bank accounts.

\(^{42}\) \textit{A, P, LUX}: scrutiny reservation on the second subparagraph of Article 11(1).
2. The judicial authorities may make the measures provided for in paragraph 1 subject to the lodging by the applicant of guarantees adequate to ensure possible compensation for the prejudice suffered by the defendant if the proceedings on the merits are subsequently judged to be unfounded.

3. Where the precautionary measures are revoked, or where they lapse due to any act or omission by the applicant, or where it is subsequently found that there has been no infringement of an intellectual property right, the judicial authorities shall have the authority to order the applicant, upon request of the defendant, to provide the defendant adequate compensation for any injury caused by these measures.43

(Articles 12 to 16 not discussed.)

SECTION 6

DAMAGES AND LEGAL COSTS

Article 17

Damages44

1. Member States shall lay down that the judicial authorities shall order an infringer to pay the right holder adequate damages in reparation of the damage incurred by the latter as a result of his intellectual property right being infringed through the infringer having engaged in an activity in the knowledge, or with reasonable grounds for knowing,45 that it would give rise to such an infringement.

To this end, the competent authorities shall award, at the request of the prejudiced party:46

(a) either damages set at double the royalties or fees which would have been due if the infringer had requested authorisation to use the intellectual property right in question;

43 D, DK: scrutiny reservation on Article 11.
44 UK, F, IRL, ES, D, LUX, B, IT: reservation on Article 17, in particular as regards subparagraph (a) of paragraph 1. F: reservation on different rules for intellectual property rights from those applicable to other rights.
45 ES: scrutiny reservation on applying the principle of knowledge or reasonable grounds for knowing in this Article but not elsewhere in the proposal for a Directive.
46 LUX: scrutiny reservation concerning the right holder being given the option to choose between subparagraphs (a) and (b).
(b) or compensatory damages corresponding to the actual prejudice (including lost profits\textsuperscript{47}) suffered by the right holder as a result of the infringement.

In appropriate cases, Member States shall lay down that the prejudice suffered can also be deemed to include elements other than economic factors, such as the moral prejudice caused to the right holder by the infringement.

2. In the case provided for in paragraph 1, point (b), Member States may provide for the recovery, for the benefit of the right holder, of all the profits made by the infringer which are attributable to that infringement and which are not taken into account when calculating the compensatory damages.

For calculating the amount of the profits made by the infringer, the right holder is bound to provide evidence only with regard to the amount of the gross income achieved by the infringer, with the latter being bound to provide evidence of his deductible expenses and profits attributable to factors other than the protected object.

\textsuperscript{47} F, IRL: scrutiny reservation on taking into account lost profits.
OUTCOME OF PROCEEDINGS

of: Working Party on Intellectual Property
on: 11 and 12 September 2003
No. prev. doc.: 12936/03 PI 91 CODEC 1248
No. Cion prop.: 6777/03 PI 19 CULT 17 CODEC 204
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

The Working Party examined Articles 12 to 27 of the above mentioned proposal, as contained in document 6777/03. The results of the discussions are set out in doc. 13027/03 ADD 1.

B, F, S and FIN maintained their general scrutiny reservations on this proposal.
We propose the inclusion of the following second subparagraph in Article 9(4) of the proposal for a Directive:

To that end, Member States shall ensure the establishment of appropriate rapid cooperation channels, including the use of data communications, between authorities which may be in possession of data on the origin of goods or services or on networks for their distribution or provision or of any other data which may help ascertain whether or not there has been an infringement and authorities empowered to determine the merits of the case.
EXPLANATION: As the Spanish delegation stated at the Working Party meeting on 16 July 2003, the inclusion of the proposed provision, while couching it in broad terms so as to leave to Member States' discretion both the channels for and the practical scope of such cooperation arrangements, is also essential in order to ensure actual protection of affected holders' rights by making it easier for the various authorities responsible for observance of them (police, customs, courts, magistrates and public trade-mark or patent offices or registrars) to exchange information swiftly and effectively.

Article 9 makes provision only for information to be channelled vertically (between courts and right holders: paragraphs 1 to 3; between right holders and competent authorities: paragraph 4); it does not cover a horizontal flow of such information, between public authorities responsible for combating piracy. Such cooperation is considered a key to swift action by the public authorities in safeguarding the rights of individuals concerned.
COUNCIL OF
THE EUROPEAN UNION

Brussels, 22 September 2003 (25.09)
(OR. fr)

12450/03
LIMITE

PI 82
CODEC 1161

WORKING DOCUMENT

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CHAPTER I

OBJECTIVE AND SCOPE

Article 1

Subject-matter

This Directive concerns the measures necessary to ensure the enforcement of intellectual property rights.

Article 2

Scope

1. Without prejudice to the means which are or may be provided for in Community or national legislation, in so far as those means may be more favourable for right holders, the measures provided for by this Directive shall apply to any infringement of the rights deriving from Community and European acts on the protection of intellectual property, as listed in the Annex, and from the provisions adopted by the Member States in order to comply with those acts [...].

2. This Directive shall be without prejudice to the particular provisions on the enforcement of rights contained in Community legislation concerning copyright and notably those found in Directive 2001/29/EC.

3. This Directive shall not affect:

   a) the Community provisions governing the substantive law on intellectual property, Directive 95/46/EC, Directive 1999/93/EC or Directive 2000/31/EC;

   b) Member States’ international obligations and notably the Agreement on Trade-Related Aspects of Intellectual Property Rights (the “TRIPS Agreement”).
CHAPTER II

MEASURES AND PROCEDURES

SECTION 1

GENERAL PROVISIONS

Article 3

General obligation

Member States shall provide for the [...] measures and penalties needed to ensure the enforcement of the intellectual property rights covered by this Directive. These measures and penalties shall be fair and equitable, and shall not be unnecessarily complicated or costly, nor entail unreasonable time-limits or unwarranted delays. They shall also be effective, proportionate and dissuasive and shall be applied in such a manner as to avoid the creation of barriers to legitimate trade.

Article 4

Penalties

Merged with Article 3.

Article 5

Persons entitled to apply for the application of the measures and procedures

1. Member States shall recognise as persons entitled to apply for application of the measures referred to in this Chapter the holders of intellectual property rights, exclusive licensees and sub-licensees, as well as all other persons authorised to use those rights in accordance with the applicable law, or their representatives.
2. Member States shall confer upon rights management or professional defence bodies, wherever they represent intellectual property right holders, exclusive licensees and sub-licensees, or other persons authorised to use these rights according to the applicable law, an entitlement to seek application of the measures and procedures referred to in this Chapter, including the authority to initiate legal proceedings for the defence of those rights or of the collective or individual interests for which they are responsible.

Such entitlement shall be accorded to any properly constituted rights management body or professional defence body, regardless of the Member State in which it is established.

[...]

Article 6

Presumption of copyright tenure

Until proved otherwise, authorship of a work shall be presumed to be vested in the person whose name, presented as being that of the author, is featured on [...] the work, or whose authorship is referred to on [...] the work by way of a statement, label or other mark.

SECTION 2

EVIDENCE

Article 7

Evidence

1. Member States shall lay down that, where a party has presented reasonably accessible evidence sufficient to support its claims, and has, in substantiating those claims, cited evidence which is to be found under the control of the opposing party, the judicial authorities may order that such evidence be produced by the opposing party, subject to the protection of confidential information.
2. Under the same conditions and in order to identify [...] the real beneficiaries of the infringement, Member States shall take such measures as are necessary to enable the responsible authorities to order, at the request of the plaintiff, the communication or seizure of banking, financial or commercial documents under the control of the defendant, subject to the protection of confidential information.

Article 8

Measures for protecting evidence

1. Member States shall lay down that, where there is a demonstrable risk that evidence may be destroyed even before the commencement of proceedings on the merits of the case, the judicial authorities may, in the event of an actual or imminent infringement of an intellectual property right, authorise in any place either the detailed description, with or without the taking of samples, or the physical seizure of the infringing goods, and, in appropriate cases, the documents relating thereto. These measures shall be taken by order issued on application, if necessary without the other party having been heard.

Where evidence-protection measures have been adopted without the other party having been heard, the affected parties shall be given notice immediately after the execution of the measures at the latest. A review, including a right to be heard, shall take place upon request of the affected parties with a view to deciding, within a reasonable period after the notification of the measures, whether the measures shall be modified, revoked or confirmed.

2. Member States shall lay down that physical seizure may be subject to the applicant’s lodging of an adequate guarantee intended to ensure compensation for any prejudice suffered by the defendant if the proceedings instituted against him are subsequently judged to be unfounded.

3. Member States shall lay down that, if the applicant has not instituted legal proceedings leading to a decision on the merits of the case within a reasonable interval, which shall be specified by the judicial authority ordering the measures when the law of a Member State permits or, in the absence of such specification, within 31 calendar days of the seizure, at the request of the defendant, the seizure shall be null and void, without prejudice to the damages which may be claimed.

Where the evidence protection measures have been revoked, or where they lapse owing to any act or omission by the applicant, or where it is subsequently found that there has been no infringement of any intellectual property right, the judicial authorities shall have be empowered to order the applicant, at the defendant’s request, to provide the defendant with adequate compensation for any injury caused by the measures.
SECTION 3
RIGHT OF INFORMATION

Article 9
Right of information

1. Member States shall lay down that, in the context of proceedings concerning an alleged infringement of an intellectual property right, or in response to a request for provisional or precautionary measures, the judicial authorities shall order, at the request of the right holder or of the persons or bodies referred to in Article 5, unless particular reasons are invoked for not doing so, any person to provide information on the origin of the goods or services which are thought to infringe an intellectual property right and on the networks for their distribution or provision, respectively, if that person:

(a) was found in possession, for commercial purposes, of the infringing goods;

(b) was found to be using the infringing services for commercial purposes; or

(c) was indicated by the person referred to in point (a) or (b) as being at the origin of the goods or services or as being a link in the network for distributing those goods or providing those services.

2. The information referred to in paragraph 1 shall comprise:

(a) the names and addresses of the producers, distributors, suppliers and other previous holders of the product or service, as well as the intended wholesalers and retailers;

(b) information on the quantities produced, delivered, received or ordered, as well as the price obtained for the goods or services in question.

3. Paragraphs 1 and 2 shall apply without prejudice to other provisions which:

(a) grant the right holder rights to receive fuller information;

(b) govern the use in civil or criminal proceedings of the information communicated pursuant to this Article;

(c) govern responsibility for misuse of the right of information; or

(d) afford an opportunity for refusing to provide information which would force the person referred to in paragraph 1 to admit to involvement in an infringement of an intellectual property right.
4. Apart from the cases referred to in paragraph 1, Member States shall lay down that, when the responsible authorities are in possession of the information referred to in paragraph 2, they may so inform the right holder, provided the latter is known, while complying with the rules on the protection of confidential information, in order to allow the right holder to institute proceedings leading to a decision on the merits of the case or to obtain provisional or precautionary measures.
WORKING DOCUMENT

from: Spanish delegation

to: Working Party on Intellectual Property

No. prev. doc.: 12579/03 PI 83 CODEC 1185
No. Cion prop.: 6777/03 PI 19 CULT 17 CODEC 204

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

— Article 12 or 14

Article 12: Supply of goods to charitable associations or organisations

"1. Without prejudice to the damages due to the right holder by reason of the infringement, Member States shall lay down that the judicial authorities may order the recall, at the infringer's expense in appropriate cases, of the goods which have been found to infringe an intellectual property right.

2. Member States shall lay down that the judicial authorities may order that the goods referred to in paragraph 1 be supplied for humanitarian purposes, in the case of goods suitable for such purposes, at the operator's option and the infringer's expense, according to the specific circumstances of the individual case as assessed by the magistrate or court. The necessary
steps shall in any event be taken in order to remove or obliterate any visible features identifiable by consumers as guaranteeing goods to be genuine, so as to make it clear to them that those goods are not genuine."

EXPLANATION

In Section 5, "Measures resulting from a decision on the merits of the case", the Directive makes provision for the judicial authorities to order the recall, disposal outside commercial channels or destruction of goods, for the adoption of preventive measures to prohibit continuation of the infringement and for alternative measures where the infringer has acted without fault or negligence and the measures imposable under the section would cause him disproportionate harm, provided the injured party can reasonably be satisfied with pecuniary compensation.

As the Spanish delegation stated at the Working Party meeting on 12 September 2003, however, we can see the wisdom of including in that section a measure serving useful social and charitable purposes. Holders' rights would be effectively protected by making supply for such purposes an option for the right holder, who would not suffer any financial loss if such supply were at the infringer's expense. Moreover, in the eventuality of the goods in question re-entering commercial channels, it can be ensured that they are clearly distinguishable by consumers as counterfeit goods by removing or obliterating any visible features identifiable by consumers as guaranteeing goods to be genuine.

As an alternative, should Article 12 not be thought the appropriate place to include the proposed measure, we would suggest the wording below for Article 14 of the draft Directive.
Article 14: Destruction of goods or supply for humanitarian purposes

"Member States shall lay down that the judicial authorities may, without there being any entitlement to compensation, order the destruction of the goods which have been found to infringe an intellectual property right, or their supply for humanitarian purposes, in the case of goods suitable for such purposes, at the operator's option and the infringer's expense, where their destruction would cause disproportionate harm to the owner or infringer, according to the circumstances of the individual case as assessed by the magistrate or court. The necessary steps shall in any event be taken in order to remove or obliterate any visible features identifiable by consumers as guaranteeing goods to be genuine, so as to make it clear to them that those goods are not genuine."

EXPLANATION

As for the preceding proposal.
ADDENDUM to OUTCOME OF PROCEEDINGS

of : Working Party on Intellectual Property
on : 11 and 12 September 2003
No. prev. doc. : 12936/03 PI 91 CODEC 1248
No. Cion prop. : 6777/03 PI 19 CULT 17 CODEC 204
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
SECTION 5

MEASURES RESULTING FROM A DECISION ON THE MERITS OF THE CASE

Article 12

Recall of goods

Without prejudice to the damages due to the right holder by reason of the infringement, Member States shall lay down that the judicial authorities may order the recall, at the infringer's expense in appropriate cases, of the goods which have been found to infringe an intellectual property right.

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1 NL, FIN, P, B, D: Section 5 should apply only to infringers exploiting commercially the infringing goods and not to individual consumers who have acquired such goods in good faith. Furthermore, B, NL and D requested explicit reference to the application of the proportionality principle to all the provisions of this Section. While indicating its openness, COM pointed out that the general reference to this principle in Article 4 seemed sufficient.
2 UK: need to ensure consistency with Articles 16 and 17 of Council Regulation (EC) N° 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, 2.8.2003).
3 IT: will submit wording ensuring the application of Section 5 to cases of piracy through electronic networks.
4 D, NL questioned whether the measures in this section could also result from a decision concerning provisional measures.
5 UK, D, IRL expressed doubts on the applicability of these measures to goods infringing a patent.
6 A: delete Article 12.
7 UK: replace "judicial" by "competent" to cover also customs authorities. D, FIN against this suggestion.
8 D, DK, FIN: insert "upon request of the rightholder". COM can accept this insertion.
9 NL: insert "as well as the materials and implements used primarily for the creation or the manufacture of the goods in question".
10 ES will submit a proposal for giving such goods to not-for-profit humanitarian organisations.
Article 13

Disposal outside the channels of commerce

Member States shall lay down that the judicial authorities may order that the goods which have been found to infringe an intellectual property right, as well as the materials and implements used primarily for the creation or the manufacture of the goods in question, be disposed of outside the channels of commerce, without any compensation being due.

Article 14

Destruction of goods

Member States shall lay down that the judicial authorities may order the destruction of the goods which have been found to infringe an intellectual property right, without there being any entitlement to compensation.

Article 15

Preventive measures

1. Member States shall lay down that, when a judicial decision has been taken finding an infringement of an intellectual property right, the judicial authorities may serve the infringer with an injunction aimed at prohibiting the continuation of the infringement. Non-compliance with an injunction shall be punishable by a fine accompanied, where applicable, by a recurring fine, with a view to ensuring compliance.

2. Member States shall ensure that right holders are able to apply for an injunction to be addressed to intermediaries whose services are used by third parties to infringe an intellectual property right.

11 DK, FIN, ES: insert "at the infringer's expense".
12 DK, FIN, ES: insert "at the infringer's expense".
13 NL, D: insert "as well as the materials and implements used primarily for the creation or the manufacture of the goods in question".
14 It was agreed to align the wording of Articles 13 and 14 as regards the lack of obligation to offer compensation.
15 B, P: doubts on the appropriateness of this title.
16 A: this provision should also cover cases of threatened infringement.
17 DK, F, FIN, NL, LUX, D, P, GR: reservation on the use of the term "fine", which is linked to criminal law. IRL: scrutiny reservation on this term. COM: open to the use of a different term in order to avoid any links with criminal law here.
18 D, B, IRL, P: need to define better the term "intermediaries".
19 ES: reservation on paragraph 2, to the extent that it allows for an injunction to be addressed to a person who has not been a party to the main proceedings. A, NL: scrutiny reservation on this paragraph.
Article 16

Alternative measures\textsuperscript{20}

In appropriate cases, Member States shall lay down that, if the person liable to be subjected to the measures provided for in this Section has acted without fault or negligence\textsuperscript{21} but has nevertheless caused injury to the applicant\textsuperscript{22}, that person may, if execution of the measures in question would cause him disproportionate harm and if the injured party could reasonably be satisfied with pecuniary compensation, compensate that party in cash, with the latter’s agreement.\textsuperscript{23}

Section 6

Damages and Legal Costs

Article 17

Damages\textsuperscript{24}

1. Member States shall lay down that the judicial authorities shall order an infringer to pay the right holder adequate damages in reparation of the damage incurred by the latter as a result of his intellectual property right being infringed through the infringer having engaged in an activity in the knowledge, or with reasonable grounds for knowing, that it would give rise to such an infringement.

To this end, the competent authorities shall award, at the request of the prejudiced party:

(a) either damages set\textsuperscript{25} double the royalties or fees which would have been due if the infringer had requested authorisation to use the intellectual property right in question;

(b) or compensatory damages corresponding to the actual prejudice (including lost profits) suffered by the right holder as a result of the infringement.

\textsuperscript{20} B, D, DK, P, FIN, A, NL: reservation on Article 16, on the grounds that this provides for compensation even in cases where there has been no wilful infringement. For ES, Article 16 should be deleted in accordance with the subsidiarity principle.

\textsuperscript{21} LUX and B suggested replacing "without fault or negligence" by "in good faith" and "unintentionally" respectively.

\textsuperscript{22} UK: replace "applicant" by "rightholder".

\textsuperscript{23} B, A, D, NL, IT, LUX, DK: reservation on the words "with the latter’s agreement". COM can accept replacing these words with a reference to a fair outcome.

\textsuperscript{24} For more comments concerning Article 17 see document 12055/03 ADD 1.

\textsuperscript{25} F: insert "up to".
In appropriate cases, Member States shall lay down that the prejudice suffered can also be deemed to include elements other than economic factors, such as the moral prejudice caused to the right holder by the infringement.\(^\text{26}\)

2. In the case provided for in paragraph 1, point (b), Member States may provide for the recovery, for the benefit of the right holder, of all the profits made by the infringer which are attributable to that infringement and which are not taken into account when calculating the compensatory damages.

For calculating the amount of the profits made by the infringer, the right holder is bound to provide evidence only with regard to the amount of the gross income achieved by the infringer, with the latter being bound to provide evidence of his deductible expenses and profits attributable to factors other than the protected object.

\textit{Article 18}

\textbf{Legal costs}\(^\text{27}\)

Member States shall lay down that the legal costs, lawyer’s\(^\text{28}\) fees and any other expenses incurred by the successful party\(^\text{29}\) shall be borne by the other party, unless equity or the economic situation of the other party does not allow this\(^\text{30}\). The responsible authorities shall determine the sum to be paid.

\(^{26}\) F: scrutiny reservation on the wording of this sentence.

\(^{27}\) NL, UK, ES, LUX, IT, A, FIN, IRL, HU: delete Article 18 in accordance with the subsidiarity principle and for lack of Community competence.

\(^{28}\) HU: replace "lawyers" by "representatives".

\(^{29}\) UK: reservation on "and any other expenses incurred by the successful party".

\(^{30}\) D, A, IT, FIN, HU: reservation on "unless equity or the economic situation of the other party does not allow this".
SECTION 7

PUBLICITY MEASURES

Article 19

Publication of judicial decisions

1. Member States shall lay down that, in legal proceedings instituted for infringement of an intellectual property right, the judicial authorities may order, at the request of the right holder and at the expense of the infringer, that the decision be displayed and published in full or in part in the newspapers designated by the right holder.

2. Member States may also provide for other publicity measures which are appropriate to the particular circumstances.

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31 HU: title should read "Publicity measures".
32 DK, S, FIN, IRL, UK: reservation on Article 19 to the extent that it imposes an obligation on all Member States.
33 F, S: scrutiny reservation on Article 19.
34 A, P, D, FIN: insert "in appropriate cases". COM can accept this addition.
35 IT: insert "and the persons referred to in Article 5". COM can accept this addition.
36 NL, A, D, UK, B, GR, F: reservation on "in the newspapers designated by the right holder", on the grounds that it does not leave the courts free to decide on the most suitable means of publication on a case-by-case basis. COM is prepared to be flexible on this issue.
37 D: need to provide that publication has to take place within a certain time limit after the court's decision on the main proceedings.
38 D: paragraphs 1 and 2 should merge. COM can accept this suggestion.
CHAPTER III

CRIMINAL LAW PROVISIONS

Article 20

Criminal law provisions

1. Member States shall ensure that all serious infringements of an intellectual property right, as well as attempts at, participation in and instigation of such infringements, are treated as a criminal offence. An infringement is considered serious if it is intentional and committed for commercial purposes.

2. Where natural persons are concerned, Member States shall provide for criminal sanctions, including imprisonment.

3. As regards natural and legal persons, the Member States shall provide for the following sanctions:

   (a) fines;

   (b) confiscation of the goods, instruments and products stemming from the offences referred to in paragraph 1, or of goods whose value corresponds to those products.

   In appropriate cases, Member States shall also provide for the following sanctions:

   (a) destruction of the goods infringing an intellectual property right;

   (b) total or partial permanent or temporary closure of the establishment used primarily to commit the infringement;

   (c) a permanent or temporary ban on engaging in commercial activities;

   (d) placing under judicial supervision;

   (e) judicial winding-up;

39 After having listened to the views expressed by the representative of the Council Legal Service, a very broad majority of delegations entered a reservation on Article 20, on the grounds that, as it is currently worded, it cannot be adopted under the first pillar but rather belongs to the measures which may be adopted under the third pillar. These delegations indicated however that they could accept a general reference to sanctions (including criminal law ones), preferably in the context of Article 4.
(f) a ban on access to public assistance or subsidies;

(g) publication of judicial decisions.

4. For the purposes of this Chapter, the term “legal person” shall be understood to mean any legal entity having such status under the applicable national law, except for States or any other public bodies acting in the exercise of their prerogative of public power, as well as public international organisations.

CHAPTER IV

TECHNICAL MEASURES

Article 21

Legal protection of technical devices

1. Without prejudice to particular provisions applicable in the field of copyright, related rights and the sui generis right of the creator of a database, Member States shall provide for appropriate legal protection against the manufacture, import, distribution and use of illegal technical devices.

2. For the purposes of this Chapter,

(a) “technical device” means any technology, device or component which, in the normal course of its functioning, is designed for the manufacture of authentic goods and the incorporation therein of elements which are manifestly identifiable by customers and consumers and which make it easier to recognise the goods as being authentic.

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40 Several delegations entered a reservation on Article 21, on the grounds that its scope is not sufficiently clear.
41 UK: provide for limited exemptions in order to facilitate investigations concerning alleged anti-competitive practices and for research purposes.
42 ES: add "sale for commercial purposes".
43 A: need for a definition of "authentic goods".
44 UK, IT: scrutiny reservation on the question whether this should not be extended to elements which are manifestly identifiable by rightholders, but not necessarily by customers and consumers.
(b) “illegal technical device” means any technical device which is designed to circumvent a technical device which, permits the manufacture of goods infringing industrial property rights and incorporating the manifestly identifiable elements described in point (a).

Article 22

Codes of conduct

1. Member States shall encourage:

(a) the development by trade or professional associations or organisations of codes of conduct at Community level aimed at contributing towards the enforcement of the intellectual property rights referred to in Article 2;

(b) the establishment, by optical disc manufacturers and the professional organisations concerned, of codes of conduct aimed at helping manufacturers to combat infringements of intellectual property, particularly by recommending the use on optical discs of a source code enabling the identification of the origin of their manufacture;

(c) the submission to the Commission of draft codes of conduct at national and Community level and of any evaluations of the application of these codes of conduct.

2. The codes of conduct must be in accordance with Community law and notably the rules on competition and protection of personal data.

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45 A, B: insert "primarily". COM can accept this addition.
46 B: add "imitate or falsify". NL: add "remove or deactivate".
47 A: replace "manufacturers" by "rightholders".
48 A, P: insert "voluntary".
49 A, HU: delete paragraph 2 as superfluous. COM can accept this deletion.
CHAPTER V

ADMINISTRATIVE COOPERATION

Article 23

Assessment

1. Three years after the date laid down in Article 26(1), each Member State shall submit to the Commission a report informing it of the situation with regard to implementation of this Directive.

On the basis of those reports, the Commission shall draw up a report on the application of this Directive, including an assessment of the effectiveness of the measures taken by the various competent bodies and instances, as well as an evaluation of its impact on innovation and the development of the information society. That report shall then be transmitted to the European Parliament, the Council and the European Economic and Social Committee. It shall be accompanied, if necessary, by proposals for amendments to this Directive.

2. Member States shall provide the Commission with all the aid and assistance it may need when drawing up the report referred to in the second subparagraph of paragraph 1.

Article 24

Correspondents

1. Each Member State shall designate one or more correspondents (referred to hereinafter as “the national correspondents”) for any question relating to the implementation of the measures provided for by this Directive. It shall communicate the details of the correspondent(s) to the other Member States and to the Commission.

2. For the purposes of applying this Directive, the Member States shall co-operate with the other Member States and with the Commission via the national correspondents. They shall provide the assistance and information requested by the other Member States or the Commission as rapidly as possible, including by appropriate electronic means.

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50 NL suggests putting this Article after Article 25.
51 B, P question how the effectiveness of the measures can be assessed.
52 ES, GR: positive to the idea of creating a Contact Committee.
CHAPTER VI

FINAL PROVISIONS

Article 25

Implementation

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive not later than eighteen\(^53\) months after the date of its adoption. They shall immediately inform the Commission thereof.

When Member States adopt these provisions, these shall contain a reference to this Directive or shall be accompanied by such reference at the time of their official publication. The procedure for such reference shall be adopted by Member States.

2. Member States shall communicate to the Commission the texts of the provisions of national law which they adopt in the field governed by this Directive.

Article 26

Entry into force

This Directive shall enter into force on the twentieth day following its publication in the Official Journal of the European Union.

Article 27

Addressees

This Directive is addressed to the Member States.

Done at Brussels, […]

For the European Parliament
The President
[…]

For the Council
The President
[…]

\(^{53}\) NL, B, UK, F, P: the implementation period should be longer than eighteen months. D: scrutiny reservation on eighteen months.
COUNCIL OF THE EUROPEAN UNION

Brussels, 13 October 2003 (17.10) (OR. fr)

13155/03

Interinstitutional File:
2003/0024 (COD)

PI 94
CODEC 1286

WORKING DOCUMENT

from : Presidency
to : Working Party on Intellectual Property

No. prev. doc. : 13027/03 PI 93 CODEC 1262 + ADD 1
No. Cion prop. : 6777/03 PI 19 CULT 17 CODEC 204

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

– Proposal from the Presidency relating to Articles 10 to 20 and 23 to 27

Delegations will find attached compromise proposals from the Presidency concerning Articles 10 to 20 and 23 to 27 of the above proposal for a Directive.

Any amendment to the Commission proposal (6777/03) is indicated.
SECTION 4

Provisional and precautionary measures

Article 10

Provisional measures

1. Member States shall lay down that the judicial authorities may, at the request of the applicant:

   (a) serve the alleged infringer, or the intermediary whose services are being used by a third party to infringe a right, with an interlocutory injunction intended to prevent any impending infringement of an intellectual property right, or to forbid, on a provisional basis and subject to a recurrent fine, the continuation of the alleged infringements of an intellectual property right, or to make such continuation subject to the lodging of guarantees intended to ensure the compensation of the right holder;

   (b) authorise the seizure of the goods suspected of infringing an intellectual property right so as to prevent their introduction into or movement within channels of commerce.

The judicial authorities shall be empowered to require the applicant to provide any reasonably available evidence in order to satisfy themselves with a sufficient degree of certainty that the applicant is the right holder and that the applicant's right is being infringed, or that such infringement is imminent.

1a(new) The Member States shall lay down that, in appropriate cases and in particular if the injured party demonstrates circumstances likely to endanger the recovery of damages, the judicial authorities may authorise the precautionary seizure of the movable and immovable property of the alleged infringer, including the blocking of his bank accounts and other assets and to this end the communication or seizure of bank, financial or commercial documents.
2. Member States shall lay down that the provisional measures referred to in paragraphs 1 and 1a may, in appropriate cases, be taken without the defendant having been heard, in particular when any delay would cause irreparable prejudice to the right holder. In the event of this happening, the parties shall be so informed without delay after the execution of the measures at the latest.

A review, including the right to be heard, shall take place at the request of the defendant in order to decide, within a reasonable time after notification of the measures, whether they are to be amended, revoked or confirmed.

3. Member States shall lay down that the provisional measures referred to in paragraphs 1 and 1a shall be revoked, at the defendant's request if the applicant does not institute proceedings leading to a decision on the merits of the case before the competent judicial authority within a reasonable period to be determined by the judicial authority which orders these measures where the Member State's legislation so permits or, failing such determination, within a period not exceeding 20 working days or 31 calendar days if the latter period is longer.

4. The competent judicial authorities may make the prohibition or the seizure subject to the lodging by the applicant of adequate guarantees intended to ensure any compensation of the prejudice suffered by the defendant if the proceedings on the merits are subsequently judged to be unfounded.

5. Where the provisional measures have been revoked or where they lapse due to any act or omission by the applicant, or where it is subsequently found that there has been no infringement or threat of infringement of an intellectual property right, the judicial authorities must be empowered to order the applicant, at the request of the defendant, to provide the defendant with adequate compensation for any injury caused by these measures.
Article 11

Precautionary measures

Deleted (merged with Article 10).

SECTION 5

MEASURES RESULTING FROM A DECISION ON THE MERITS OF THE CASE

Article 12

Corrective measures

Without prejudice to the damages due to the right holder by reason of the infringement, and without compensation of any kind, Member States shall lay down that the competent judicial authorities may order that the goods in respect of which they have established that they infringe an intellectual property right and, in appropriate cases, the materials and instruments principally used in the creation or manufacture of these goods, be:

(a) recalled

(b) removed from the channels of commerce or

(c) destroyed, provided that this does not run counter to existing constitutional rules.

In appropriate cases, these measures shall be taken by the judicial authorities at the expense of the infringer.

The corrective measures must be commensurate with the seriousness of the infringement and take account of the interests of third parties.
Article 13

Disposal outside the channels of commerce

Deleted (merged with Article 12).

Article 14

Destruction of goods

Deleted (merged with Article 12).

Article 15

Injunctions

1. Member States shall lay down that, when a judicial decision has been taken finding an infringement of an intellectual property right, the judicial authorities may serve the infringer with an injunction aimed at prohibiting the continuation of the infringement. […]

2. Member States shall ensure that right holders are able to apply for an injunction to be addressed to intermediaries whose services are used by third parties to infringe an intellectual property right.

Article 16

Alternative measures

Member States shall lay down that the competent judicial authorities may alternatively in appropriate cases and at the request of the person liable to be subjected to the measures provided for in this Section, order pecuniary compensation to be paid to the injured party instead of applying the above measures if that person has acted unintentionally and without negligence and if execution of the measures in question would cause him disproportionate harm.
However, the commercial use of goods and of counterfeit goods and the supply of services shall remain prohibited where they constitute an infringement of the law or are likely to harm consumers.

[SECTION 6

DAMAGES AND LEGAL COSTS]

Article 17

Damages

1. Member States shall lay down that the competent judicial authorities shall order an infringer to pay the right holder adequate damages in reparation of the damage incurred by the latter as a result of his intellectual property right being infringed through the infringer having engaged in an activity in the knowledge, or with reasonable grounds for knowing, that it would give rise to such an infringement.

To this end, the competent judicial authorities shall award, at the request of the injured party:

(a) either, in appropriate cases, damages set at [up to] double the royalties or fees which would have been due if the infringer had requested authorisation to use the intellectual property right in question;

(b) or compensatory damages corresponding to the actual prejudice (including lost profits) suffered by the right holder as a result of the infringement.

In appropriate cases, Member States shall lay down that the prejudice suffered can also be deemed to include elements other than economic factors, such as the moral prejudice caused to the right holder by the infringement.
2. In the case provided for in paragraph 1, point (b), Member States may provide for the recovery, for the benefit of the right holder, of all the profits made by the infringer which are attributable to that infringement and which are not taken into account when calculating the compensatory damages.

For calculating the amount of the profits made by the infringer, the right holder is bound to provide evidence only with regard to the amount of the gross income achieved by the infringer, with the latter being bound to provide evidence of his deductible expenses and profits attributable to factors other than the protected object.

3. (new) Member States may lay down that the judicial authorities may order the recovery of profits and/or the payment of damages even if the infringer has carried out an activity which infringes an intellectual property right without being aware of it or without having reasonable grounds for being aware of it.

Article 18

Legal costs

Member States shall lay down that the legal costs, lawyer's fees and any other expenses incurred by the successful party may be borne by the other party, unless equity [...] does not allow this. The competent authorities shall determine the sum to be paid.
SECTION 7

PUBLICITY MEASURES

Article 19

Publication of judicial decisions

1. Member States shall lay down that, in legal proceedings instituted for infringement of an intellectual property right, the judicial authorities may order, […] at the expense of the infringer, appropriate measures for the distribution of the information concerning the decision, including displaying the decision and publishing it in full or in part in the media […].

2. Deleted.

CHAPTER III

CRIMINAL LAW PROVISIONS

Article 20

Criminal law provisions

1. Without prejudice to the measures and procedures provided for under this Directive, Member States shall adopt the necessary measures to ensure that at least all intentional or attempted infringements of an intellectual property right committed [on a commercial scale] are liable to penal sanctions.
2. Member States shall lay down that penal sanctions include, where appropriate, imprisonment and fines large enough to be dissuasive. In appropriate cases, possible sanctions shall also include the seizure, confiscation and destruction of the goods in question and of all materials and instruments principally used to commit the offence.

CHAPTER V

ADMINISTRATIVE COOPERATION

Article 23

Assessment

1. Three years after the date laid down in Article 25(1), each Member State shall submit to the Commission a report informing it of the situation with regard to implementation of this Directive.

On the basis of those reports, the Commission shall draw up a report on the application of this Directive, including an assessment of the effectiveness of the measures taken […], as well as an evaluation of its impact on innovation and the development of the information society. That report shall be transmitted to the European Parliament, the Council and the European Economic and Social Committee. It shall be accompanied, if necessary, by proposals for amendments to this Directive.

2. Member States shall provide the Commission with all the aid and assistance it may need when drawing up the report referred to in the second subparagraph of paragraph 1.
Article 24

Exchange of information and correspondents

1. (new) Member States shall ensure that flexible and appropriate procedures for cooperation are established between them, in particular the exchange of information, using telematic means, between, on the one hand, the administrative authorities responsible for the protection of intellectual property and, on the other hand, those which hold information on the origin and networks for the distribution of goods or the supply of services or other information relating to the infringement of intellectual property rights.

2. For this purpose, each Member shall designate one or more national correspondents who shall coordinate cooperation with the other Member States and with the Commission to ensure as rapidly as possible that the information referred to in paragraph 1 is provided and that cooperation is effective. The details of the correspondents shall be communicated to the other Member States and to the Commission.

CHAPTER VI
FINAL PROVISIONS

Article 25
Implementation

Unchanged.

Article 26
Entry into force

Unchanged.

Article 27
Addressees

Unchanged.
Opinion of the European Economic and Social Committee on the ‘Proposal for a Directive of the European Parliament and of the Council on measures and procedures to ensure the enforcement of intellectual property rights’

(COM(2003) 46 final — 2003/0024 (COD))

(2004/C 32/02)

On 4 March 2003 the Council decided to consult the European Economic and Social Committee, under Article 95 of the Treaty establishing the European Community, on the above-mentioned proposal.

The Section for the Single Market, Production and Consumption, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 7 October 2003. The rapporteur was Mr Retureau.

At its 403rd plenary session of 29 and 30 October 2003 (meeting of 29 October), the European Economic and Social Committee adopted the following opinion by 115 votes to one with four abstentions.

1. Presentation and summary

1.1. Following a series of initial (and still incomplete) vertical texts, including current and draft legislation on industrial property (patents, Community trade mark, trade marks and designs, trade names — referred to henceforth as IP) and literary and artistic property (copyright and related rights, ad-hoc rights, resale rights, artists' and publishers' rights — referred to henceforth as LAP), the Commission is now presenting a horizontal project concerning civil proceedings and certain aspects of criminal procedures and sanctions for piracy and counterfeiting within the internal market.

2. Grounds

2.1. According to the proposal's explanatory memorandum, the provisions of Article 41 of the WTO TRIPS (Trade-Related Aspects of Intellectual Property Rights) Agreement to protect IP-LAP rights in international trade are insufficient; disparities between national laws in terms of procedures and sanctions also affect the single market by creating distortions in the field of civil and criminal legal means of combating piracy and counterfeiting.

2.1.1. Organised crime is moving into all these illegal activities on a dangerous scale. Moreover, the high-speed Internet network makes it easier to pirate software and other intellectual works, such as music. For these reasons, prosecution procedures, protection under civil law of the rights of IP-LAP right holders and certain criminal sanctions applicable to pirates and counterfeiters should be harmonised across the internal market.

3. Summary of the opinion

3.1. The Committee supports the objective pursued and endorses the principle of horizontal harmonisation of measures to combat piracy and counterfeiting, which is on the rise in both third countries and Member States, and is damaging to the legitimate interests of consumers, companies and individual authors; as Community law currently stands, the Committee considers the form of a horizontal directive, as proposed, to be appropriate. It would however make a number of comments and suggestions regarding the text referred to it for an opinion.

3.2. The Committee would like to see a draft directive which clearly proposes measures to protect bona fide consumers and, more generally, consumer education and information measures on IP-LAP rights, focusing especially on young people.

3.3. In the digital and Internet field, the EESC urges that no backing be given to measures, even in guideline form, which would affect the legitimate rights or privacy of consumers and users, would impose an excessive burden on internet-access providers, or could even drive those publishers who offer alternative solutions — especially open source software and formats (which can be freely used and reproduced) or private copying software and hardware — off the market.
3.4. IP-LAP rights, which confer exclusive rights upon holders, amount to temporary, legally constituted monopolies; they are only allowed for specified periods of time, and without prejudice to the greater public interest, are not unlimited and must not hamper the free dissemination and transfer of theoretical and scientific knowledge and technologies, such as those relating to Internet, on which a competitive knowledge-based economy depends — and which does not yet exist in Europe.

3.5. The above comments by the Committee are in keeping with the TRIPS objectives (Article 7) and their underlying principles (Article 8(2)) (1); these should be included in the recitals of the directive, since the possible penalties cannot be entirely dissociated from substantive law, and possible abuses of IP-LAP rights by right holders must not be overlooked.

3.6. Where counterfeit products which put users or their property at risk are concerned, specific sanctions with sufficient deterrent effect must be provided, together with adequate compensation in the event of accidents involving injury or damage. Market withdrawal, confiscation and destruction measures, at the infringer's cost, are absolutely necessary in such cases. Consumers and consumer organisations must enjoy adequate means under law to seek compensation for losses incurred and to punish infringers.

3.7. Lastly, the EESC calls upon the Commission to commit itself to in-depth independent sectoral studies employing a transparent methodology. These should seek in particular to encourage convergent legislation and a global strategy for developing closer judicial, police and customs cooperation, including studies and regular reports and other appropriate initiatives. The purpose would be to effectively combat pirating and counterfeiting from the manufacturing stage onwards, primarily targeting criminal networks together with those who habitually trade in pirated or counterfeited tangible or intangible goods. The Committee also calls upon the Member States to give urgent consideration to all opportunities for cooperation between themselves and with the Community to this end.

II. Analysis of the proposal and comments

4. General comments

4.1. The explanatory memorandum mentions the Green Paper on the fight against counterfeiting and piracy, in respect of which the EESC would refer to its earlier opinion (2). The Committee would also refer to its other opinions mentioned by the Commission, and to its opinion on the patentability of computer-implemented inventions (3).

4.2. The Committee endorses the overall object of the draft directive. It notes, however, that European patents issued by a certain number of countries (which vary depending on where they are filed) adhering to the 1973 Munich Convention have been included within the scope of the directive. In principle Community jurisdiction does not extend to the convention in either substantive or territorial terms, unless the Community joins it. The situation will differ with the future Community patent, which will be valid in all Member States and over which the Community will have jurisdiction. However, it is the Committee's view that the WTO TRIPS Agreement requires the Community to protect all existing IP-LAP rights throughout its territory and, moreover, that such protection lies within the Community's powers concerning the internal market (Article 95 of the Treaty establishing the European Community). This article is the legal basis for the directive and sets out to remove distortions of competition as a result of disparities between national rights, procedures and practices.

4.3. It should also be pointed out that effective measures against European or international criminal networks, or against large-scale counterfeiting and pirating, would require a comprehensive, coordinated and coherent approach, covering cooperation under the second pillar between courts, police forces and customs services, reinforcement of the customs code, criminal law, measures against organised crime and money laundering, as well as Europol and Interpol functions, since counterfeited objects or pirated works often originate in third countries.

(1) Article 7. Objectives. The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

Article 8. Principles (...) 2. Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology www.wto.org.


4.4. The Committee cannot fail to take note of the mismatch between the objectives set out in the introduction and the content of the draft directive itself. It represents only a first step which does not yet come close to meeting the enormous economic and social challenges posed by industrial counterfeiting and piracy which affect employment, competitiveness and businesses, chiefly SME-SMIs, who are least able to identify those infringing their intangible rights and to uphold these rights in foreign national courts.

4.5. Harmonisation is becoming all the more urgent since with enlargement, bringing in more Member States, legislative and procedural differences will multiply, entailing a risk of distortion of the internal market. The long overdue advent of the European patent makes such harmonisation even more essential.

4.6. The Committee would prefer a combination of national rights which offer effective protection to right holders and consumers in keeping with the different legal systems and the general principles of law applied by them (in particular the presumption of innocence and protection of privacy). This might be done in conjunction with a relatively early review. Excessive obligations should not be imposed on certain businesses (including Internet-access providers and manufacturers of blank media), and neither should the rights of legitimate users be restricted or all consumers taxed indiscriminately (tax on blank media for the benefit of certain right holders but not all). The aim should be harmonisation which is more than just the sum of those provisions offering the greatest protection to right holders only, taken out of their national context, and should also allow legislation, parts of legislation, or procedures to be strengthened in those countries where they are insufficiently developed.

4.7. In view of the diversity of national situations and the huge numbers of counterfeit goods, regular evaluation of the impact of the directive, and of any adjustments made in line with changing circumstances, would be essential. If necessary, measures to protect specific sectors could then be envisaged.

4.8. In this spirit, the Committee for the present approves the option for a directive which should provide for coherent means of protection and a form of harmonisation which reflect the spirit of the various legal systems, rather than a regulation which could severely disrupt existing laws which are successfully performing their functions. In the longer term, movement towards a regulation may be possible regarding the Community patent and trade mark. In spite of the differences in procedure or national legislation, it would for the moment suffice for each Member State and candidate country to introduce real protection and effective deterrent and punitive measures against pirating and counterfeiting for commercial ends or by criminal gangs. It should also be noted that the directive would impose radical changes on some national legal systems even though they provide effective solutions.

4.9. The Committee considers the personal scope of the proposal to be sufficiently broad. Although directives such as those on software or copyright and related rights acknowledge the rights of users and consumers, such as the right to back-up copying, private use or for demonstration or educational purposes, but such rights and their scope vary from country to country: whether or not they are implemented is left to the workings of subsidiarity. In this respect, the Committee regrets the emerging trend in a number of countries to further curtail or abolish users’ rights.

4.10. The Commission’s competence in criminal affairs is the subject of a dispute between the Council and the Commission currently before the Court of the Justice, and the Committee cannot prejudge the issue which will become res judicata in the future. However, in earlier opinions the Committee has generally accepted that, inter alia by means of a framework directive, the Commission could propose harmonisation of the criminal sanctions needed to enforce first pillar provisions, and would only alter its approach in the light of a relevant judgement of the CJEC.

4.11. Turning to practical steps to halt pirating and counterfeiting and compensation for businesses incurring losses, national judges should retain their powers of discretion in concreto concerning economic losses and infringement of non pecuniary rights or brand image. Judges, sometimes assisted by experts, are empowered to set the amount of civil damages incurred and fines or other applicable criminal sanctions according to national law, although in some countries these sanctions should be revised and put into effective practice to give them real deterrent effect.

4.12. The Committee believes that independent, rigorous sectoral studies should be carried out in advance to provide an objective evaluation of factors which vary widely in scale and their actual effect on sectors, particularly in their impact on the economy and employment, on SMEs-SMIs and on consumers. This applies in particular to products which may affect health, safety or the guarantees which users may legitimately expect (spare parts, toys, electrical equipment, etc.). Such an important issue as protection of consumers against counterfeit products merits far greater attention as a part of anti-counterfeiting strategy.
4.13. The proposed harmonisation must be balanced and in proportion to the objectives set. Implementing measures and sanctions are dependent upon substantive law, and should also be designed to be as favourable as possible to consumers, their protection and the effectiveness of their legitimate rights as users. Consumers or their representatives should be able to participate as civil parties to actions brought by right holders against pirates and counterfeiters, in cases where users, acting in good faith, have incurred loss as a result of pirated or counterfeit products.

4.14. Bona fide users should not be implicated in any enquiries by police, judicial or customs authorities, who alone are authorised to carry out investigations, into the origin of objects or programmes in their possession.

4.15. The Committee believes that future measures must primarily target those European and international networks which present the greatest danger to consumer safety and business interests. Investigations, cross-border and international cooperation, protection of evidence and deterrent penalties are necessary. Proportionate deterrent measures could be applied to users acting in bad faith, within the framework of the existing national laws, bearing in mind that future major efforts must primarily focus on achieving tangible results for the European economy, consumer safety and employment.

4.16. Lastly, the need to make IP-LAP compatible with the knowledge and information society is only mentioned in passing, and compatibility with public interest requirements is not mentioned at all. These are however major issues, and the harmonisation of means of protecting research and production investments must involve more than blanket reinforcement of civil and penal sanctions and greater judicial and material resources for legal investigations and proceedings.

4.17. Neither should harmonisation block the dissemination of knowledge and its use in teaching, which requires publication of inventions, innovations, new procedures and computer programme sources for the purposes of interoperability, at least for application interfaces and file formats. In any case, reverse engineering should not be considered to constitute counterfeiting. Similarly, independent programmes enabling files, including protected ones, to be read or their format to be changed cannot be judged to infringe copyright since an independent creation is involved, and unlimited extension of the legal scope of the copyright concept is unacceptable in the light of the general principle of interpreting criminal offences in as restrictive a way as possible.

5. Specific comments

5.1. The preliminary general considerations of the proposal appear rather confused, taking an equally condemnatory view of criminal gangs, individuals who wittingly or unwittingly acquire counterfeit products and teenagers swapping music through the web. Some of the considerations do not match the scope of the draft directive: they should be removed from what is an otherwise relevant and balanced proposal.

5.2. In the Committee's view, the steps to be taken should be diverse and tailored to each clearly identified and defined category of rights and economic sector. It must be ensured that legitimate measures of protection do not become an intimidating arsenal of civil and criminal law which could, in some cases, paralyse innovation on the part of SMEs-SMIs under constant threat of counterfeit proceedings by certain monopolies or oligopolies.

5.3. All 'options' affecting web surfers' private lives or preventing users from fully exercising their rights (right to private copying, right to play CDs-DVDs on different types of machine, right to choose one's computer operating system without having to pay for a preloaded system and programmes the price of which is kept secret, right to non-zoned DVD players, etc.) represent improper restrictions, possibly forced purchase, or sale of products with truncated functions, and are unacceptable to the Committee, since they are disproportionate to their stated — and in any case, often unfair — aims.

5.4. The arrangements for taxing blank writable media are even more unjust if such media or systems are protected against copying by built-in hardware or software devices.

5.5. It would be better for companies in the sector to concentrate their innovative efforts on viable commercial models in the digital communications age in order to harness a huge potential market, rather than viewing all consumers as potential pirates or seeking perpetual unearned income by taxing blank media or imposing disabling technical restrictions on reading tools or media. Many viable software manufacturers market their products on-line at reasonable prices. The first Internet pay-distribution companies in the music sector show that a market which respects the rights of music publishers and artists can still be created and developed.
5.6. The Committee does however fully endorse the voluntary system for identifying the origin of blank writable media, which should help combat industrial-scale counterfeiting. Codes of conduct for public and private enterprises on the proper management of intangible property rights should also be encouraged, and have already provided real results in Europe: the number of ‘code-compliant’ companies is growing, and this trend will certainly be confirmed if licence prices are not set at an abusive level and if competition can effectively be brought to bear (e.g. monopolies or oligopolies in several sectors). In this context, excluding from the scope of the directive all institutions and undertakings acting in the exercise of their prerogative of public power is difficult to justify with regard to codes of conduct. Neither Community or national institutions, nor public enterprises may be exempted from compliance with IP-LAP rights.

6. Lastly, the Committee wishes to comment in detail on certain articles of the draft directive:

— Damages: the provisions here are extremely, sometimes excessively, precise, such as the requirement for the complainant to provide evidence of the profits made by the defendant, and in support of which the defendant must provide accounts for illegal or criminal activity ...

— European and national organisations defending consumers’ rights must be recognised as being qualified to take part in general interest actions or actions for injunctions, provided they are legally constituted and representative.

— In purely civil proceedings, damages are justified by the serious prejudice incurred by the complainant, not by the intentional character of the infringement of rights; in contrast, if the civil proceedings are subordinate to criminal proceedings, then the intentional nature of the prejudice must be established.

Brussels, 29 October 2003.

The President of the European Economic and Social Committee

Roger BRIESCH

— Provisional and precautionary measures: although on the grounds of urgency a court may not initially be required to hear the defendant, principally in order to prevent destruction or removal of evidence, the defendant must in all cases then be heard with equal urgency; seizure of goods or freezing of bank accounts may cripple a wrongly-accused company or even drive it completely off the market. Respect for the rights of the defence is an inalienable principle of Community law.

— Evidence: the appropriate criminal courts alone may order the seizure of bank, financial or commercial documents and their forwarding to a civil jurisdiction; in the context of on-going criminal proceedings, it is generally the courts which are competent.

— Penalties: in addition to destruction of goods, seizure of pirating or counterfeiting equipment might also be envisaged. Any criminal penalties applicable to legal persons depend on the internal law of each country. These penalties should be brought into line with the legal systems of the individual Member States.

— Publication of judgments: the proposed wording places no restrictions on publication: the judge lays down either an overall sum to be used for this purpose, or the titles of publications and the form that the statement should take (summary of the judgment or in extenso report).

— Technical measures: whether or not a technical device or copying or counterfeiting software is unlawful often depends not on their nature but on the purposes for which they are used. The same means may be used for legitimate ends (individual back-up copying, for example). In consequence, circumventing an improper technical device in order to exercise a consumer’s right cannot be regarded as unlawful.

— Codes of conduct: these should also set out consumers’ rights and guarantees, in keeping with Community law.
WORKING DOCUMENT

from: Presidency

to: Working Party on Intellectual Property

No. prev. doc.: 14001/03 PI 106 CODEC 1471
No. Cion prop.: 6777/03 PI 19 CULT 17 CODEC 204

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

- Revised Presidency proposal for Articles 1 to 9

Delegations will find in Annex a revised compromise proposal from the Presidency concerning Articles 1 and 9 of the above proposal for a Directive.

The amendments in relation to 12450/03 PI 82 CODEC 1161 are indicated.
ANNEX

CHAPTER I

OBJECTIVE AND SCOPE

Article 1

Subject-matter

This Directive concerns the measures necessary to ensure the enforcement of intellectual property rights.

Article 2

Scope

1. Without prejudice to the means which are or may be provided for in Community or national legislation, in so far as those means may be more favourable for right holders, the measures provided for by this Directive shall apply to any infringement of copyright, related rights, sui generis rights of a database manufacturer and of the creator of the topographies of a semiconductor product, trademark law, patent law, law of geographical indications, law of designs, law of utility models and law of plant varieties. In this respect, Member States shall ensure that the judicial authorities take due account of the specific characteristics of each case when determining the applicable penalties and relevant arrangements.

2. This Directive shall be without prejudice to the particular provisions on the enforcement of rights and derogations contained in Community legislation concerning copyright and related rights, notably those found in Directive 2001/29/EC and, in particular, Articles 2 to 5 and Article 8 thereof.
3. This Directive shall not affect:

(a) the Community provisions governing the substantive law on intellectual property, Directive 95/46/EC, Directive 1999/93/EC or Directive 2000/31/EC in general, and the provisions of Articles 12 to 15 thereof in particular;

(b) Member States’ international obligations and notably the Agreement on Trade-Related Aspects of Intellectual Property Rights (the “TRIPS Agreement”).

CHAPTER II

MEASURES AND PROCEDURES

SECTION 1

GENERAL PROVISIONS

Article 3

General obligation

Member States shall provide for the measures, procedures and penalties needed to ensure the enforcement of the intellectual property rights covered by this Directive. These measures, procedures and penalties shall be fair and equitable, and shall not be unnecessarily complicated or costly, nor entail unreasonable time-limits or unwarranted delays.
The measures and penalties shall also be effective, proportionate and dissuasive and shall be applied in such a manner as to avoid the creation of barriers to legitimate trade.

Article 4

Penalties

Merged with Article 3.

Article 5

Persons entitled to apply for the application of the measures and procedures

1. Member States shall recognise as persons entitled to seek application of the measures referred to in this Chapter the holders of intellectual property rights, as well as all other persons authorised to use those rights in accordance with the applicable law, or their representatives. This entitlement shall also be accorded to exclusive licensees and sub-licensees or their representatives if the holder of the rights so permits or if, following formal notification, the holder fails to apply to the court within a reasonable period of time.

2. Member States shall confer upon rights management or professional defence bodies, wherever they have a mandate to represent intellectual property right holders, or other persons authorised to use these rights according to the applicable law, an entitlement to seek application of the measures and procedures referred to in this Chapter, including the authority to initiate legal proceedings for the defence of those rights or of the collective or individual interests for which they are responsible. This entitlement shall also be accorded to exclusive licensees and sub-licensees under the conditions laid down in paragraph 1.
Such entitlement shall be accorded to any properly constituted rights management body or professional defence body, regardless of the Member State in which it is established

Article 6

Presumption of copyright tenure

Until proved otherwise, authorship of a work shall be presumed to be vested in the person whose name, presented as being that of the author, is featured on the work, or whose authorship is referred to on the work by way of a statement, label or other mark.

SECTION 2

EVIDENCE

Article 7

Evidence

1. Member States shall lay down that, on application by a party which has presented reasonably accessible evidence sufficient to support its claims, and has, in substantiating those claims, cited evidence which is to be found under the control of the opposing party, the competent judicial authorities may order that such evidence be produced by the opposing party, subject to the protection of confidential information.
2. Under the same conditions and in order to identify those involved in the infringement, Member States shall take such measures as are necessary to enable the competent judicial authorities to order, at the request of the plaintiff, the communication or seizure of banking, financial or commercial documents under the control of the defendant, subject to the protection of confidential information.

**Article 8**

**Measures for protecting evidence**

1. Member States shall lay down that, where there is a demonstrable risk that evidence may be destroyed even before the commencement of proceedings on the merits of the case, the competent judicial authorities may, in the event of an actual or imminent infringement of an intellectual property right, authorise in any place either the detailed description, with or without the taking of samples, or the physical seizure of the infringing goods, and, in appropriate cases, the documents relating thereto. These measures shall be taken by order issued on application, if necessary without the other party having been heard.

Where evidence-protection measures have been adopted without the other party having been heard, the affected parties shall be given notice immediately after the execution of the measures at the latest. A review, including a right to be heard, shall take place upon request of the affected parties with a view to deciding, within a reasonable period after the notification of the measures, whether the measures shall be modified, revoked or confirmed.

2. Member States shall lay down that physical seizure may be subject to the applicant’s lodging of an adequate guarantee intended to ensure compensation for any prejudice suffered by the defendant if the proceedings instituted against him are subsequently judged to be unfounded.
3. Member States shall lay down that the seizure shall be revoked at the request of the defendant, without prejudice to the damages which may be claimed, if the applicant has not instituted legal proceedings leading to a decision on the merits of the case before the competent judicial authority within a reasonable interval, which shall be specified by the judicial authority ordering the measures when the law of a Member State permits or, in the absence of such specification, within an interval not exceeding 20 working days or 31 calendar days [...] if longer.

Where the evidence protection measures have been revoked, or where they lapse owing to any act or omission by the applicant, or where it is subsequently found that there has been no infringement or threat of infringement of any intellectual property right, the judicial authorities shall be empowered to order the applicant, at the defendant’s request, to provide the defendant with adequate compensation for any injury caused by the measures.

SECTION 3

RIGHT OF INFORMATION

Article 9

Right of information

1. Member States shall lay down that, in the context of proceedings concerning an alleged infringement of an intellectual property right, or in order to comply with a request for provisional or precautionary measures, the competent judicial authorities may order, at the request of the right holder or of the persons or bodies referred to in Article 5, in appropriate cases and unless particular reasons are invoked for not doing so, any person to provide
information on the origin of the goods or services which are thought to infringe an intellectual property right and on the networks for their distribution or provision, respectively, if that person:

(a) was found in possession, for commercial purposes, of the infringing goods;

(b) was found to be using the infringing services for commercial purposes; or

(c) was indicated by the person referred to in point (a) or (b) as being the producer or distributor of the goods or the provider of the services.

2. The information referred to in paragraph 1 shall comprise:

(a) the names and addresses of the producers, distributors, suppliers and other previous holders of the product or service, as well as the intended wholesalers and retailers;

(b) information on the quantities produced, delivered, received or ordered, as well as the price obtained for the goods or services in question.

3. Paragraphs 1 and 2 shall apply without prejudice to other provisions which:

(a) grant the right holder rights to receive fuller information;

(b) govern the use in civil or criminal proceedings of the information communicated pursuant to this Article;

(c) govern responsibility for misuse of the right of information; or

(d) afford an opportunity for refusing to provide information which would force the person referred to in paragraph 1 to admit to involvement in an infringement of an intellectual property right.
4. Apart from the cases referred to in paragraph 1, Member States shall lay down that, when the responsible administrative authorities are in possession of the information referred to in paragraph 2, they may so inform the right holder, provided the latter is known, while complying with the rules on the protection of confidential information […].
The committee adopted the report by Janelly FOURTOU (EPP-ED, F) amending the proposal under the 1st reading of the codecision procedure: - the term 'intellectual property' should be replaced by 'intellectual and industrial property' so that the scope of the directive will also cover such areas as trademarks; - the scope of the directive should be widened in the area of civil and administrative measures: i.e. it should not be restricted to cases where intellectual property rights are infringed for commercial purposes or where an infringement causes significant harm to the right holder; - Member States should ensure that the judicial authorities take due account of the specific characteristics of each individual case, such as the intentional or unintentional nature of the infringement, when choosing penalties. Moreover, penalties should be "appropriate to the infringement" and proportionate; - where goods infringing an intellectual property right have been purchased in good faith, recall of such goods may only be enforced if it is not wholly disproportionate; - measures for enforcing intellectual property rights must be in line with rules on competition law; - to speed up procedures, provision should be made to allow for a reasonable sampling of a large number of seized goods as evidence for presuming, until proved otherwise, that all of the seizure has been counterfeited or pirated; - Member States should be able to require Internet service providers to "inform the competent authorities without delay of presumed illegal activities" and to hand over, where requested, relevant information making it possible to identify the users of those services; - the Commission should consider measures to counter the problem of "look-alike products" which do not infringe any intellectual or industrial property rights but mislead consumers and could possibly endanger public health; - the committee introduced a new article stipulating that Member States should encourage "awareness campaigns" to educate the public about the risks and problems associated with piracy and counterfeiting and about the rights and obligations linked to on-line content usage and infringement; - a European data-base, providing information on the description and location of counterfeited material, should be set up and made accessible to the public; - it should be made mandatory for standardised identification codes to be included on all optical discs containing, or capable of containing, elements protected by intellectual property rights; - patents should be excluded from the scope of the directive in view of their special nature. ?
Delegations will find in the Annex a revised compromise proposal from the Presidency concerning Articles 10 to 27 of the above proposal for a Directive.

The amendments to 13155/03 and 14001/03 are indicated.
SECTION 4

PROVISIONAL AND PRECAUTIONARY MEASURES

Article 10

Provisional measures

1. Member States shall lay down that the judicial authorities may, at the request of the applicant:

(a) serve the alleged infringer, or the intermediary whose services are being used by a third party to infringe a right, with an interlocutory injunction intended to prevent any impending infringement of an intellectual property right, or to forbid, on a provisional basis and subject to a recurrent fine, the continuation of the alleged infringements of an intellectual property right, or to make such continuation subject to the lodging of guarantees intended to ensure the compensation of the right holder;

(b) authorise the seizure of the goods suspected of infringing an intellectual property right so as to prevent their introduction into or movement within channels of commerce.

The judicial authorities shall be empowered to require the applicant to provide any reasonably available evidence in order to satisfy themselves with a sufficient degree of certainty that the applicant is the right holder and that the applicant's right is being infringed, or that such infringement is imminent.

1a. In cases of infringement committed on a commercial scale, the Member States shall lay down that, [...] if the injured party demonstrates circumstances likely to endanger the
recovery of damages, the judicial authorities may authorise the precautionary seizure of the movable and immovable property of the alleged infringer, including the blocking of his bank accounts and other assets and to this end the communication or seizure of bank, financial or commercial documents.

2. Member States shall lay down that the provisional measures referred to in paragraphs 1 and 1a may, in appropriate cases, be taken without the defendant having been heard, in particular when any delay would cause irreparable prejudice to the right holder. In the event of this happening, the parties shall be so informed without delay after the execution of the measures at the latest.

A review, including the right to be heard, shall take place at the request of the defendant in order to decide, within a reasonable time after notification of the measures, whether they are to be amended, revoked or confirmed.

3. Member States shall lay down that the provisional measures referred to in paragraphs 1 and 1a shall be revoked, at the defendant’s request if the applicant does not institute proceedings leading to a decision on the merits of the case before the competent judicial authority within a reasonable period to be determined by the judicial authority which orders these measures where the Member State’s legislation so permits or, failing such determination, within a period not exceeding 20 working days or 31 calendar days if the latter period is longer.

4. The competent judicial authorities may make the injunction or the seizure subject to the lodging by the applicant of adequate guarantees intended to ensure any compensation of the prejudice suffered by the defendant as provided for in paragraph 5.

5. Where the provisional measures have been revoked or where they lapse due to any act or omission by the applicant, or where it is subsequently found that there has been no infringement or threat of infringement of an intellectual property right, the judicial authorities must be empowered to order the applicant, at the request of the defendant, to provide the defendant with adequate compensation for any injury caused by these measures.
Article 11
Precautionary measures

Deleted (merged with Article 10).

SECTION 5

MEASURES RESULTING FROM A DECISION ON THE MERITS OF THE CASE

Article 12
Corrective measures

Without prejudice to the damages due to the right holder by reason of the infringement, and without compensation of any kind, Member States shall lay down that the competent judicial authorities may order that the goods in respect of which they have established that they infringe an intellectual property right and, in appropriate cases, the materials and instruments principally used in the creation or manufacture of these goods, be:

(a) recalled from the channels of commerce,
(b) removed definitively from the channels of commerce or
(c) destroyed [...].

In appropriate cases, these measures shall be taken by the judicial authorities at the expense of the infringer.

The corrective measures must be commensurate with the seriousness of the infringement and take account of the interests of third parties.
Article 13
Disposal outside the channels of commerce

Deleted (merged with Article 12).

Article 14
Destruction of goods

Deleted (merged with Article 12).

Article 15
Injunctions

1. Member States shall lay down that, when a judicial decision has been taken finding an infringement of an intellectual property right, the judicial authorities may serve the infringer with an injunction aimed at prohibiting the continuation of the infringement.

2. […] Right holders must be able to apply for an injunction to be addressed to intermediaries whose services are used by third parties to infringe an intellectual property right.

Article 16
Alternative measures

Member States shall lay down that the competent judicial authorities may alternatively in appropriate cases and at the request of the person liable to be subjected to the measures provided for in this Section, order pecuniary compensation to be paid to the injured party instead of applying the
above measures if that person has acted unintentionally and without negligence, if execution of the
measures in question would cause him disproportionate harm and if pecuniary compensation
appears reasonably satisfactory to the injured party.

However, the commercial use of goods and of counterfeit goods and the supply of services shall
remain prohibited where they constitute an infringement of the law or are likely to harm
consumers.

[SECTION 6

DAMAGES AND LEGAL COSTS]

Article 17

Damages

1. Member States shall lay down that the competent judicial authorities shall order an
infringer to pay the right holder adequate damages in reparation of the damage incurred by
the latter as a result of his intellectual property right being infringed through the infringer
having engaged in an activity in the knowledge, or with reasonable grounds for knowing,
that it would give rise to such an infringement.

To calculate the damages, this end, the competent judicial authorities shall award:

(a) either, fixed-sum, damages set at up to double the royalties or fees which would have
been due if the infringer had requested authorisation to use the intellectual property
right in question;
(b) or damages which take into account all appropriate aspects such as the economic consequences for the injured Party as a result of the infringement, and the unfair profits made by the infringer.

In appropriate cases, Member States shall lay down that the prejudice suffered can also be deemed to include elements other than economic factors, such as the moral prejudice caused to the right holder by the infringement.

Damages shall not be punitive.

2. Deleted.

3. Member States may lay down that the judicial authorities may order the recovery of profits and/or the payment of damages even if the infringer has carried out an activity which infringes an intellectual property right without being aware of it or without having reasonable grounds for being aware of it.

Article 18
Legal costs

Member States shall lay down that the legal costs, lawyer's fees and any other expenses incurred by the successful party shall be borne by the other party, unless equity does not allow this. The competent authorities shall determine the sum to be paid.
SECTION 7

PUBLICITY MEASURES

Article 19
Publication of judicial decisions

Member States shall lay down that, in legal proceedings instituted for infringement of an intellectual property right, the judicial authorities may order, at the expense of the infringer, appropriate measures for the dissemination of the information concerning the decision, including displaying the decision and publishing it in full or in part in the media.

CHAPTER III

CRIMINAL LAW PROVISIONS

Article 20
Criminal law provisions

1. Without prejudice to the civil and/or administrative measures provided for under this Directive, Member States shall adopt the necessary measures to ensure that at least every […] infringement […] of an intellectual property right of a serious and intentional nature is liable to penal sanctions.

2. Deleted.
CHAPTER IV
TECHNICAL MEASURES

Article 21
Legal protection of technical devices

1. Without prejudice to particular provisions applicable in the field of copyright, related rights and the *sui generis* right of the creator of a database, Member States shall provide for appropriate legal protection against the manufacture, import, distribution and use of illegal technical devices.

2. For the purposes of this Chapter,

   (a) "technical device" means any technology, device or component which, in the normal course of its functioning, is designed for the incorporation in tangible products protected by an industrial property right of elements which are manifestly identifiable by customers and consumers and which make it easier to recognise the goods as being authentic;

   (b) "illegal technical device" means any technology, device or component which is designed to incorporate in tangible products elements designed to deceive or mislead any person as to the authenticity of the products in question.

Article 22
Codes of conduct

1. Member States shall encourage:
(a) the development by trade or professional associations or organisations of codes of conduct at Community level aimed at contributing towards the enforcement of the intellectual property rights referred to in Article 2, particularly by recommending the use on optical discs of a source code enabling the identification of the origin of their manufacture;

(b) the submission to the Commission of draft codes of conduct at national and Community level and of any evaluations of the application of these codes of conduct.

CHAPTER V

ADMINISTRATIVE COOPERATION

Article 23

Assessment

1. Three years after the date laid down in Article 25(1), each Member State shall submit to the Commission a report informing it of the situation with regard to implementation of this Directive.

On the basis of those reports, the Commission shall draw up a report on the application of this Directive, including an assessment of the effectiveness of the measures taken, as well as an evaluation of its impact on innovation and the development of the information society. That report shall be transmitted to the European Parliament, the Council and the European Economic and Social Committee. It shall be accompanied, if necessary, by proposals for amendments to this Directive.

2. Member States shall provide the Commission with all the aid and assistance it may need when drawing up the report referred to in the second subparagraph of paragraph 1.
Article 24

Exchange of information and correspondents

1. Member States shall ensure that flexible and appropriate procedures for cooperation are established between them, in particular the exchange of information, using telematic means, between, on the one hand, the administrative authorities responsible for the protection of intellectual property and, on the other hand, those which hold information on the origin and networks for the distribution of goods or the supply of services or other information relating to the infringement of intellectual property rights.

2. For this purpose, each Member shall designate one or more national correspondents who shall coordinate cooperation with the other Member States and with the Commission to ensure as rapidly as possible that the information referred to in paragraph 1 is provided and that cooperation is effective. The details of the correspondents shall be communicated to the other Member States and to the Commission.

CHAPTER VI

FINAL PROVISIONS

Article 25

Implementation

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by … [eighteen months after the date of adoption
of this Directive] at the latest. They shall forthwith inform the Commission thereof.

When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the text of the provisions of national law which they adopt in the field covered by this Directive.

Article 26
Entry into force

This Directive shall enter into force on the twentieth day following its publication in the Official Journal of the European Union.

Article 27
Addresses

This Directive is addressed to the Member States.
COUNCIL OF
THE EUROPEAN UNION

Brussels, 28 November 2003 (01.12)
(OR. fr)

15295/03
ADD 1

Interinstitutional File:
2003/0024 (COD)

PI 125
CODEC 1674

WORKING DOCUMENT
from : Presidency
to : Working Party on Intellectual Property
No. prev. doc. : 14862/03 PI 116 CODEC 1618
No. Cion prop. : 6777/03 PI 19 CILT 17 CODEC 204
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
– Revised Presidency compromise proposal for Articles 10 to 27

Delegations will find attached an alternative for Article 17 of the proposed Directive.

The amendments to 13155/03 are indicated.
Article 17

Damages

1. Member States shall lay down that the competent judicial authorities, at the request of the injured party, shall order an infringer to pay the right holder adequate damages in reparation of the damage incurred by the latter as a result of his intellectual property right being infringed through the infringer having engaged in an activity in the knowledge, or with reasonable grounds for knowing, that it would give rise to such an infringement.

   To calculate damages corresponding to the actual prejudice, including lost profits, suffered by the right holder as a result of the infringement, the competent judicial authorities shall take into account all relevant aspects including, in appropriate cases, profits lost by the injured party and/or profits made by the infringer.

   As a calculation method, damages may also consist of the equivalent of the amount of the licence fee which would have been due if the infringer had applied for authorisation to use the intellectual property, which may be increased up to double that amount.

   In appropriate cases, Member States shall lay down that the prejudice suffered can also be deemed to include elements other than economic factors, such as the moral prejudice caused to the right holder by the infringement.

   [Damages shall not be punitive.]

   For calculating the amount of the profits made by the infringer, the right holder is bound to provide evidence only with regard to the amount of the gross income achieved by the infringer, with the latter being bound to provide evidence of his deductible expenses and profits attributable to factors other than the protected object.
2. [Member States may provide that the recovery, for the benefit of the right holder, of all the profits made by the infringer which are attributable to the infringement shall be added, where appropriate, to the damages determined in accordance with paragraph 1, provided they have not already been taken into account when calculating the amount of the damages.]

(Second subparagraph moved to paragraph 1)

3. Member States may lay down that the judicial authorities may order the recovery of profits and/or the payment of damages even if the infringer has carried out an activity which infringes an intellectual property right without being aware of it or without having reasonable grounds for being aware of it.
REPORT

Committee on Legal Affairs and the Internal Market

Rapporteur: Janelly Fourtou
## Symbols for procedures

<table>
<thead>
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<th>Symbol</th>
<th>Description</th>
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| *      | Consultation procedure  
majority of the votes cast |
| **I    | Cooperation procedure (first reading)  
majority of the votes cast |
| **II   | Cooperation procedure (second reading)  
majority of the votes cast, to approve the common position  
majority of Parliament’s component Members, to reject or amend the common position |
| ***    | Assent procedure  
majority of Parliament’s component Members except in cases covered by Articles 105, 107, 161 and 300 of the EC Treaty and Article 7 of the EU Treaty |
| ***I   | Codecision procedure (first reading)  
majority of the votes cast |
| ***II  | Codecision procedure (second reading)  
majority of the votes cast, to approve the common position  
majority of Parliament’s component Members, to reject or amend the common position |
| ***III | Codecision procedure (third reading)  
majority of the votes cast, to approve the joint text |

(The type of procedure depends on the legal basis proposed by the Commission)

## Amendments to a legislative text

In amendments by Parliament, amended text is highlighted in **bold italics**.  
Highlighting in *normal italics* is an indication for the relevant departments showing parts of the legislative text for which a correction is proposed, to assist preparation of the final text (for instance, obvious errors or omissions in a given language version). These suggested corrections are subject to the agreement of the departments concerned.
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OPINION OF THE COMMITTEE ON INDUSTRY, EXTERNAL TRADE, RESEARCH AND ENERGY ........................................................................................................................ 43
By letter of 30 January 2003 the Commission submitted to Parliament, pursuant to Articles 251(2) and 95 of the EC Treaty, the proposal for a directive of the European Parliament and of the Council on measures and procedures to ensure the enforcement of intellectual property rights (COM(2003) 46 – 2003/0024(COD)).

At the sitting of 10 March 2003 the President of Parliament announced that he had referred the proposal to the Committee on Legal Affairs and the Internal Market as the committee responsible and the Committee on Industry, External Trade, Research and Energy for its opinion (C5-0055/2003).

The Committee on Legal Affairs and the Internal Market had appointed Janelly Fourtou rapporteur at its meeting of 20 February 2003.

The committee considered the Commission proposal and draft report at its meetings of 29 April 2003, 22 May 2003, 1 and 20 October 2003 and 4 and 27 November 2003.

At the last meeting it adopted the draft legislative resolution by 28 votes to 0, with 3 abstentions.

The following were present for the vote Giuseppe Gargani, (chairman), Bill Miller, (vice-chairman), Janelly Fourtou, (rapporteur), Uma Maija Aaltonen, Paolo Bartolozzi, Ward Beysen, Isabelle Caullery (for Brian Crowley), Willy C.E.H. De Clercq (for Diana Wallis), Gianfranco Dell'Alba (for Alexandre Varaut pursuant to Rule 153(2)), Bert Doorn, Raina A. Mercedes Echerer, Francesco Fiori, Marie-Françoise Garaud, Evelyne Gebhardt, Fiorella Ghildartoti, Robert Goebbels, Malcolm Harbour, Stephen Hughes, Christopher Huhne, Wilfried Kuckelkorn, Carlos Lage (for Carlos Candal pursuant to Rule 153(2)), Kurt Lechner, Klaus-Heiner Lehne, Sir Neil MacCormick, Toine Manders, Hans-Peter Mayer (for José María Gil-Robles Gil-Delgado), Arlene McCarthy, Manuel Medina Ortega, Angelika Niebler (for Lord Inglewood), Marcelino Oreja Arburúa (for Rainer Wieland), Anne-Marie Schaffner, Peter William Skinner, Hannes Swoboda, Marianne L.P. Thyssen, leke van den Burg (for François Zimeray pursuant to Rule 153(2)), Joachim Wuermeling, Matti Wuori, Stefano Zappalà and Jürgen Zimmerling.

The opinion of the Committee on Industry, External Trade, Research and Energy is attached.

The report was tabled on 5 December 2003.
The European Parliament,

– having regard to the Commission proposal to the European Parliament and the Council (COM(2003) 46)¹,

– having regard to Articles 251(2) and 95 of the EC Treaty, pursuant to which the Commission submitted the proposal to Parliament (C5-0055/2003),

– having regard to Rule 67 of its Rules of Procedure,

– having regard to the report of the Committee on Legal Affairs and the Internal Market and the opinion of the Committee on Industry, External Trade, Research and Energy (A5-0468/2003),

1. Approves the Commission proposal as amended;

2. Calls on the Commission to refer the matter to Parliament again if it intends to amend the proposal substantially or replace it with another text;

3. Instructs its President to forward its position to the Council and Commission.

Text proposed by the Commission

Amendments by Parliament

Amendment 1
Title

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on measures and procedures to ensure the enforcement of intellectual property rights

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on measures and procedures to ensure the enforcement of intellectual and industrial property rights

(This amendment applies throughout the text. Adopting it will necessitate corresponding changes throughout.)

¹ Not yet published in OJ.
Justification

The term ‘intellectual property’ does not include industrial property, which covers such areas as trademarks.

Amendment 2
Recital -1 (new)

(-1) In June 2003, the European Parliament adopted a written declaration calling for strong, harmonised civil sanctions for any intellectual property infringement, tough criminal penalties for commercial-scale counterfeiting and increased action to make consumers aware that piracy and counterfeiting are not victimless crimes.

Amendment 3
Recital 10

(10) The objective of this Directive is to approximate legislative systems so as to ensure a high, equivalent and homogeneous level of protection in the Internal Market. This protection is essential against infringements carried out on for commercial purposes or which cause significant harm to the right holder, apart from minor and isolated infringements.

Justification

The purpose of the measures in the proposed directive is the legal protection of intellectual property rights. They should ideally apply to any infringement of those rights. But Member States must have the opportunity of deciding to apply sanction mechanisms in a graduated manner. And we need to specify that the national courts should take due account of the specific nature of each case.

Amendment 4
Recital 12

(12) This Directive shall not affect the application of the rules of competition, and
in particular Articles 81 and 82 of the Treaty. Furthermore, the measures provided for in this Directive must not be used to prevent competition.

Justification

*It must be made clear that the enforcement of intellectual property rights will not be used as a pretext to exclude competitors from the market. This would damage competition within the European Union and also bring the justified enforcement of intellectual property rights into disrepute.* Amendment 5

Recital 13

(13) It is necessary to define the scope of this Directive as widely as possible in order to encompass all the intellectual property rights covered by Community provisions in this field and by the resulting national provisions, while excluding certain activities which do not involve intellectual property in the strict sense. Nevertheless, that requirement does not affect the possibility, on the part of those Member States which so wish, to extend, for internal purposes, the provisions of this Directive to include acts involving unfair competition or similar activities.

*Patents need excluding from the directive's scope in view of their special nature.*

Furthermore, the proposed directive ignores actions requested by several business sectors in response to the Green Paper on the fight against counterfeiting and piracy (COM(98) 569 final).

Amendment 6

Recital 21

(21) Other measures designed to ensure a  (21) Other measures designed to ensure a
high level of protection exist in certain countries and must be made available in all the Member States. This is the case with the right of information, which allows precise information to be obtained on the origin of the infringing goods, the distribution channels and the identity of the third parties involved in the infringement, as well as the publication of judicial decisions on infringements of intellectual property, which makes it possible to inform the public and deter third parties from committing such infringements. However, this should not constitute a general obligation to monitor third parties.

Justification

To establish consistency with Directive 2000/31/EC and emphasise that the extent of the duty of vigilance in favour of third parties remains clearly limited.

Amendment 7
Recital 21 a (new)

(21a) After the accession of the candidate countries there will be a new European border, which has to be closed for import of illegal goods and production methods to protect the entire Internal Market. The European Commission should encourage and provide funds for border controls and improvement of enforcement of intellectual property rights in those countries.

Amendment 8
Recital 23 a (new)

(23a) This Directive creates no other liability for information society services and intermediaries than is provided for in Directive 2000/31/EC.
(26) Protection measures make a major contribution towards combating infringements of intellectual property. Appropriate legal protection of security and authentication devices which protect against copying, manipulation or neutralisation is therefore necessary in the field of industrial property, and already exists in the field of copyright. Moreover, these protection measures targeting the abuse of technical devices to infringe intellectual property rights are in line with Article 6 of the Convention on Cybercrime adopted by the Council of Europe in Budapest on 23 November 2001.

(26) Technical protection devices make a major contribution towards combating infringements of intellectual property. Their purpose is to protect original products from imitation or counterfeiting or make imitated or counterfeit products easier to identify. They also make it possible to monitor the distribution chain with regard to certain goods or batches, without requiring monitoring to be introduced within the distribution chain, so as to obtain information on a certain attitude to use on the part of the good's end consumer. Appropriate legal protection of security and authentication devices which protect against copying, manipulation or neutralisation is therefore necessary in the field of industrial property, and already exists in the field of copyright. There are many types of technical protection device. There are apparent security elements (holograms, watermarks, guilloches, metameric colour combinations, optical variable ink, microscript) and hidden security elements (reagent colours, luminescence, photochromic and thermochromic colours, fluorescence, hidden information technology, melier fibres, nano-markers, molecular structures, laser markings) or combinations of these, which can be both a component of the product itself and of primary and secondary packaging materials. Apparent security elements may contain visible information that does not have to be readable but becomes readable only with the right-holder's aids. Where the laws of the Community or Member States prescribe the labelling of certain products for purposes other than those laid down here, the technical protection devices must not be combined with them.

Technical protection devices must not be used in order to seal off markets from one another. For this reason it is not unlawful for third parties to use technical protection devices when such use is necessary to
maintain legitimate competition. In particular, legitimate parallel trading in the Community must not be monitored by the use of technical protection devices. This also applies to the hindering or complete exclusion of trading in spare parts by designing appliances for which such spare parts are intended in such a way that they will only accept the spare parts of the appliance’s manufacturer.

Moreover, these protection measures targeting the abuse of technical devices to infringe intellectual property rights are in line with Article 6 of the Convention on Cybercrime adopted by the Council of Europe in Budapest on 23 November 2001.

Justification

First of all we distinguish ‘technical protection devices’ from the technical protection measures under Directive 2001/29/EC. Then we describe the functions they perform. As a matter of principle, monitoring the distribution chain for a given product is admissible. Technical protection devices do not enjoy protection where their purpose is also to monitor the end-consumer’s attitude to use. This could for instance include the radio frequency identification method (RFID) in which microchips transmitting radio waves are incorporated in products but are undecodable, to make it possible to obtain user behaviour information after a product is acquired. Here we need to ensure that such a purpose is inadmissible per se and as such should be de-activated on purchase or capable of being de-activated by the end-consumer after purchase.

Amendment 10
Recital 27

(27) Industry must take an active part in the fight against piracy and counterfeiting. The development of codes of conduct in the circles directly affected is a supplementary means of bolstering the regulatory framework. The Member States, in collaboration with the Commission, should encourage the development of codes of conduct in general. Monitoring of the manufacture of optical discs, particularly by means of an identification code embedded in discs produced on the territory of the Community, helps to limit infringements of intellectual property in this sector which suffers from piracy on a large scale.
However, these technical protection measures must not be *misused* with a view to protecting markets and preventing parallel imports.

However, these technical protection measures must not be *implemented in such a way as to create barriers to the single market, to facilitate anti-competitive behaviour or* with a view to protecting markets and preventing parallel imports.

Amendment 11
Recital 27a (new)

(27a) The Member States will ensure that the manufacturers of optical storage discs, including master discs that contain or are capable of containing components protected by intellectual property rights, affix on all such discs a uniformly standardised code for the entire branch of the industry, clearly indicating the place of manufacture of the storage disc concerned. Optical storage discs are CDs, CD-ROMs and DVDs, and any medium developed in future that is manufactured by means of an optical storage procedure. Measures of this kind will help to reduce the serious problem of piracy. But such measures must not be misused with the aim of partitioning markets and affecting trade between Member States.

Justification

*See amendments to Articles 22 and 22a.*

Amendment 12
Article 1

This Directive concerns the measures necessary to ensure the enforcement of intellectual property rights.

This Directive concerns the measures necessary to ensure the enforcement of intellectual and industrial property rights.

Justification

*The term 'intellectual property' does not include industrial property, which covers such areas as trademarks.* Amendment 13

Article 2, paragraph 1
1. Without prejudice to the means which are or may be provided for in Community or national legislation, in so far as those means may be more favourable for right holders, the measures provided for by this Directive shall apply to any infringement of the rights deriving from Community and European acts on the protection of intellectual property, as listed in the Annex, and from the provisions adopted by the Member States in order to comply with those acts when the infringement is committed for commercial purposes or causes significant harm to the right holder.

Amendment 14
Article 2, paragraph 2

2. This Directive shall be without prejudice to the particular provisions on the enforcement of rights contained in Community legislation concerning copyright and notably those found in Directive 2001/29/EC.

Amendment 15
Article 2, paragraph 3

3. This Directive shall not affect:
   a) the Community provisions governing the substantive law on intellectual property, Directive 95/46/EC, Directive 1999/93/EC or Directive 2000/31/EC;

   b) Member States international obligations and notably the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement).

3. This Directive shall not affect:

   b) Member States international obligations and notably the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement);
Amendment 16

Article 3

Member States shall provide for the proportionate measures and procedures needed to ensure the enforcement of the intellectual property rights covered by this Directive.

These measures and procedures shall be such as to remove from those responsible for an infringement of an intellectual-property right the economic benefits of that infringement. They shall be fair and equitable, and shall not be unnecessarily complicated or costly, nor entail unreasonable time-limits or unwarranted delays.

These measures and procedures shall be applied in such a manner as to avoid the creation of barriers to legitimate trade.

Member States shall provide for the measures and procedures needed to ensure the enforcement of the intellectual property rights covered by this Directive.

These measures and procedures shall provide for effective and proportionate means, appropriate to the infringement and deterring further infringements, in particular by removing from those responsible for an infringement of an intellectual property right the economic benefits of that infringement. They shall be fair and equitable, and shall not be unnecessarily complicated or costly, nor entail unreasonable time-limits or unwarranted delays.

These measures and procedures shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and must be in line with rules on competition law.

Procedures within the meaning of this Directive shall be administrative and court procedures (administrative and civil procedures).

Any penalty must be effective, proportionate and deterrent, and take account of the intentional or unintentional character of the infringement.

Justification

For the directive to succeed the measures must have a clearly deterrent effect on counterfeitors and pirates. At the same time there is a need to ensure the procedure is based on the principle of proportionality.
Amendment 17
Subheading (to be added after Article 3)

Provisions of civil and administrative law,
and relating to the law of evidence

Justification

To make the structure of the text more transparent.

Amendment 18
Article 4

Member States shall ensure that any infringement of an intellectual property right covered by Article 2 is punishable by penalties. These penalties must be effective, proportionate and deterrent.

Justification

See amendment to Article 3.

Amendment 19
Article 5, paragraph 1

1. Member States shall recognise as persons entitled to apply for application of the measures referred to in this Chapter the holders of intellectual property rights, as well as all other persons authorised to use those rights in accordance with the applicable law, or their representatives.

(This amendment applies throughout the text. Adopting it will necessitate corresponding changes throughout.)

Justification

It needs to be clear that only right-holders, exclusive licence-holders and sub-licence-holders and their legitimate representatives should be authorised to initiate legal proceedings if
intellectual property rights are infringed.

Moreover, organisations which are not explicitly mandated by the right-holders concerned to take action should not be authorised initiate proceedings. The opportunity for professional organisations to take legal action must of course prevent right-holders from initiating proceedings on their own behalf.

Amendment 20
Article 5, paragraph 2

2. Member States shall confer upon rights management or professional defence bodies, wherever they represent intellectual property right holders or other persons authorised to use these rights according to the applicable law, an entitlement to seek application of the measures and procedures referred to in this Chapter, including the authority to initiate legal proceedings for the defence of those rights or of the collective or individual interests for which they are responsible.

Such entitlement shall be accorded to any properly constituted rights management body or professional defence body, regardless of the Member State in which it is established

The first and second subparagraphs shall be without prejudice to the applicable rules on the representation of parties in court proceedings.

Justification

There is a need to clarify the point that only right-holders, exclusive licensees and sub-licensees and their lawful representatives are entitled to initiate legal proceedings in the event of infringement of intellectual property rights.

Bodies that are not expressly authorised by the relevant right-holders of intellectual property rights to seek the application of measures should not be entitled to bring court actions. Obviously the fact that professional bodies are not entitled to initiate proceedings must not be allowed to prevent right-holders from taking action on their own behalf. As regards their entitlement to take action it should be made clear that the Member State’s procedural law will apply.
Amendment 21  
Article 6, paragraphs 1 (new) and 2

1. Until proved otherwise, the existence of copyright or related rights shall be presumed for any work or any other object which is protected under the Berne Convention.

Until proved otherwise, authorship of a work shall be presumed to be vested in the person whose name, presented as being that of the author, is featured on copies of the work, or whose authorship is referred to on a copy of the work by way of a statement, label or other mark.

2. Until proved otherwise, authorship of a work or copyright or a related right shall be presumed to be vested in the person or entity whose name is featured on copies of the work or on any other protected object, or on its packaging, or which features in relation to the work or another protected object, notably by way of a written or electronic statement, label or any other indication.

Justification

The presumption should be extended to related rights.

Amendment 22  
Article 6, paragraph 3 (new)

3. Where either ownership of the copyright or related rights in question, or the existence of such copyright or related rights, is reasonably disputed, or where the applicant provides evidence of the existence and ownership of the copyright or related rights in question, such evidence and a written statement to this effect may be issued, and such statement shall be deemed to have legal force unless evidence is produced to the contrary.
Amendment 23
Article 6, paragraph 4 (new)

4. If and in so far as reproduced items in intangible form are offered for sale, information in electronic form establishing ownership of a right shall be deemed equivalent. This shall in particular apply with regard to information for the enforcement of rights under Article 7 of Directive 2001/29/EC.

Amendment 24
Article 7, paragraph 2

2. In order to identify and prosecute the real beneficiaries of the infringement, Member States shall take such measures as are necessary to enable the responsible authorities to order the communication or seizure of banking, financial or commercial documents, subject to the protection of confidential information.

2. In order to identify and prosecute the real beneficiaries of the infringement, Member States shall take such measures as are necessary to enable the responsible authorities to order the communication of the alleged infringer’s banking, financial or commercial documents, in so far as such documents are necessary to substantiate the claims being made. The protection of confidential information shall be guaranteed.

Justification

Seizure of banking, financial or commercial documents should rather form part of the investigation stage of a given criminal procedure.

Amendment 25
Article 7, paragraph 2 a (new)

2a. The judicial authorities shall make the measures provided for in paragraph 1 subject to guarantees by the applicant adequate to ensure possible compensation for the prejudice suffered by the defendant if the proceedings are subsequently judged to be unfounded.
Measures ordered on the basis of paragraphs 1 (and 2) of Article 7 can be costly to the entities or individuals addressed by the order. If the order is based on claims that later prove to be unfounded, it is only reasonable that the entities targeted by the order are indemnified for the loss that they have suffered as a result. The effectiveness of the measures made available by paragraphs 1 (and 2) would not be reduced by this amendment. If the party is convinced of the validity of its claims, it should not be deterred from making use of the measures provided for in paragraphs 1 (or 2): if that party prevails on its claims, it will simply be returned the sum it deposited as a guarantee with interest and it will suffer no loss. By contrast, the addition of the proposed amendment would be effective in discouraging spurious claims, as parties knowing they are unlikely to prevail but wanting to abuse the process provided for in Article 7 for different ends (e.g., perhaps simply disruption of the other party’s ordinary course of business) are less likely to do so if they risk losing a guarantee.

Amendment 26
Article 7, paragraph 2b (new)

2b. Member States shall make provision to ensure that, when a substantial number of copies of a work or any other protected object is seized or is the subject of a complaint for infringement of rights, the evidence established on the basis of a reasonable sampling of such copies or objects shall permit the presumption, until proved otherwise, that all such copies of articles:

(a) contain certain works or other protected objects,

(b) comprise certain characteristics or specifications, or

(c) infringe a right.

Justification

When seizures concern a substantial quantity of counterfeit articles (as frequently occurs) it becomes very expensive and arduous for the right-holders to prove that each of the seized articles infringes their right. The right-holders and courts have to examine hundreds of thousands of articles when it is obvious from inspecting part of the seizure that all of it has been counterfeited or pirated.

The proposed legal presumption would allow a reasonable sampling for a large number of seized goods while authorising proof of the contrary. The legislation and case-law of some
Member States (such as Greece or Finland) already recognise the sampling of counterfeit goods. And Council Regulation No 3295/94 on customs action against counterfeiting already permits sampling by customs officers to speed up the procedure (Article 6).

Amendment 27
Article 8

1. Member States shall lay down that, where there is a demonstrable risk that evidence may be destroyed even before the commencement of proceedings on the merits of the case, the judicial authorities may, in the event of an actual or imminent infringement of an intellectual property right, authorise in any place either the detailed description, with or without the taking of samples, or the physical seizure of the infringing goods, and, in appropriate cases, the documents relating thereto. These measures shall be taken by order issued on application, if necessary without the other party having been heard.

Where evidence-protection measures have been adopted without the other party having been heard, the affected parties shall be given notice immediately after the execution of the measures at the latest. A review, including a right to be heard, shall take place upon request of the affected parties with a view to deciding, within a reasonable period after the notification of the measures, whether the measures shall be modified, revoked or confirmed.

2. Member States shall lay down that physical seizure may be subject to the applicant’s lodging of an adequate guarantee intended to ensure compensation for any prejudice suffered by the defendant if the proceedings instituted against him are subsequently judged to be unfounded.

3. Member States shall lay down that, if the applicant has not instituted legal
proceedings leading to a decision on the merits of the case within 31 calendar days of the seizure, the seizure shall be null and void, without prejudice to the damages which may be claimed.

Where the evidence protection measures have been revoked, or where they lapse owing to any act or omission by the applicant, or where it is subsequently found that there has been no infringement of any intellectual property right, the judicial authorities shall have been empowered to order the applicant, at the defendant’s request, to provide the defendant with adequate compensation for any injury caused by the measures.

3a. Member States may take measures to protect witnesses’ identity.

Justification

Provision of a banker’s guarantee or similar assurance should also suffice to allow the applicant to show that he has the means to indemnify the defendant.

The period within which the applicant must initiate proceedings must be laid down by the appropriate national court, and the period of 20/31 days imposed only in the absence of such a ruling. This is compatible with Article 50(6) of the Trips Agreement.

Applicants frequently depend on evidence provided by members of the public concerning suspected infringements of intellectual property rights. The effective administration of justice requires such informers to be able to provide evidence without incurring any social, economic or personal risk of affecting their employment. So it must be possible to produce evidence to a court without requiring the identity of the witness concerned to be provided to the court or, at least, to the infringer/defendant. That is not creating any new rule for such evidence. The aim is just to allow the court to know the source of the evidence and take a view on its provenance. Such a procedure already exists under Irish law.

A measure such as this will not in any way adversely affect the defendant. It is up to the court to consider the evidence to decide if sound arguments have been produced in favour of issuing a search order. Execution of the order will provide the evidence on which to base an action for the alleged infringement of intellectual property rights. If the evidence is established, an
action will follow; if none is provided, it will not (and the defendant will be protected in accordance with Article 8(3)).

Amendment 28
Article 8 a (new)

Article 8a

Protection of confidential information

The legal examination as to whether evidence that must be produced or may be seized under this Directive is subject to confidentiality protection shall be carried out in accordance with the material and procedural provisions of the Member States, taking account of the relevant provisions of Community law and the case-law of the Court of Justice.

Amendment 29
Article 9

1. Member States shall lay down that, in order to deal with proceedings involving an infringement of an intellectual property right, or in response to a request for provisional or precautionary measures, the judicial authorities shall order, at the request of the right holder, unless particular reasons are invoked for not doing so, any person to provide information on the origin of the goods or services which are thought to infringe an intellectual property right and on the networks for their distribution or provision, respectively, if that person:

(a) was found in possession, for commercial purposes, of the infringing goods;

(b) was found to be using the infringing services for commercial purposes; or

1. Member States shall lay down that, in connection with proceedings for an alleged infringement of an intellectual property right, or in response to a request for provisional or precautionary measures, the judicial authorities shall order, in response to a justified and proportionate request submitted by the applicant, unless particular reasons are invoked for not doing so, any person to provide information on the origin of the goods or services which are thought to infringe an intellectual property right and on the networks for their distribution or provision, respectively, if that person:

(a) was found in possession of the infringing goods;

(b) was found to be using the infringing services or was providing services used in infringing activities to the extent that such information is available to the person providing or using such services, taking into account the applicable data
(c) was indicated by the person referred to in point (a) or (b) as being at the origin of the goods or services or as being a link in the network for distributing those goods or providing those services.

2. The information referred to in paragraph 1 shall comprise:

(a) the names and addresses of the producers, distributors, suppliers and other previous holders of the product or service, as well as the intended wholesalers and retailers;

(b) information on the quantities produced, delivered, received or ordered, as well as the price obtained for the goods or services in question.

3. Paragraphs 1 and 2 shall apply without prejudice to other provisions which:

(a) grant the right holder rights to receive fuller information;

(b) govern the use in civil or criminal proceedings of the information communicated pursuant to this Article;

(c) govern responsibility for misuse of the right of information;

(d) afford an opportunity for refusing to provide information which would force the person referred to in paragraph 1 to admit to the existence of an infringement of an

protection rules; or

(c) was indicated by the person referred to in point (a) or (b) as being involved in the manufacture or provision of the goods or services or as being a link in the network for distributing those goods or providing those services.

2. The information referred to in paragraph 1 shall comprise:

(a) the names and addresses of the producers, distributors, suppliers and other previous holders of the product or service, as well as the intended wholesalers and retailers;

(b) information on the quantities produced, delivered, received or ordered, as well as the price obtained for the goods or services in question.

2a. A person referred to in paragraph 1, after the initiation of investigations, must not communicate with his suppliers or other potential infringers down the supply chain with a view to hampering the ongoing investigations.

2b. Member States shall establish appropriate penalties for persons who find themselves in the circumstances described in paragraph 1 but refuse to provide information or fail to do so fully.

3. Paragraphs 1 and 2 shall apply without prejudice to other provisions which:

(a) grant the right holder rights to receive fuller information;

(b) govern the use in civil proceedings of the information communicated pursuant to this Article without prejudice to the case-law and provisions on the confidentiality of information sources;

(c) govern responsibility for misuse of the right of information;

(d) afford an opportunity for refusing to provide information which would force the person referred to in paragraph 1 to admit to participation in an infringement of an
intellectual property right.

intellectual property right;

(da) govern the protection of natural persons with regard to the treatment of data of a personal nature;

(db) exempt members of the liberal professions in the fields of legal advice, tax advice and auditing, and their employees, from the requirement to supply information where these professions receive information from their clients in the context of independent legal advice or in representing their client in court proceedings.

4. Apart from the cases referred to in paragraph 1, Member States shall lay down that, when the responsible authorities are in possession of the information referred to in paragraph 2, they may so inform the right holder, provided the latter is known, while complying with the rules on the protection of confidential information, in order to allow the right holder to institute proceedings leading to a decision on the merits of the case or to obtain provisional or precautionary measures.

4a. The Member States shall not impose on service providers within the meaning of Articles 12, 13 and 14 of Directive 2000/31/EC any general requirement to monitor the information transmitted or stored by them or to actively search for information indicating an illegal activity. The Member States may require information society service providers to inform the competent authorities without delay of presumed illegal activities or information on the part of the users of its services, or require them to transmit to the competent authorities on demand information whereby the users of their services, which whom they have concluded agreements on storing information, may be identified.
Article 10, paragraphs 3 and 4

3. Member States shall lay down that a prohibitory measure shall be revoked if the applicant does not institute proceedings leading to a decision on the merits of the case within thirty-one calendar days from the day on which the right holder became aware of the facts on which it is based.

3. Member States shall lay down that the defendant may call for a prohibitory measure to be revoked if the applicant has not instituted proceedings leading to a decision on the merits of the case within a reasonable period, to be determined by the appropriate judicial authority ordering the measure in the Member States where that is permitted or, in the absence of such determination, within a period of no more than 20 working days, or 31 calendar days if that is longer, from the date of notifying the defendant of the measure.

4. The judicial authorities may make the prohibition subject to the lodging by the applicant of adequate guarantees intended to ensure any compensation of the prejudice suffered by the defendant if the proceedings on the merits are subsequently judged to be unfounded.

4. The judicial authorities may make the prohibition subject to the lodging by the applicant of an adequate guarantee or provision of an equivalent assurance intended to ensure any compensation of the prejudice suffered by the defendant if the proceedings on the merits are subsequently judged to be unfounded.

Amendment 31
Article 10, paragraph 5

5. Where the provisional measures have been revoked or where they lapse due to any act or omission by the applicant, or where it is subsequently found that there has been no infringement or threat of infringement of an intellectual property right, the judicial authorities shall have been empowered to order the applicant, at the request of the defendant, to provide the defendant adequate compensation for any injury caused by these measures.

5. Where the provisional measures have been revoked or where they lapse due to any act or omission by the applicant, or where it is subsequently found that there has been no infringement or threat of infringement of an intellectual property right, the judicial authorities shall have been empowered to order the applicant, at the request of the defendant, to provide the defendant adequate damages for any loss of rightful profits caused by these measures.

Amendment 32
Article 10 a (new)
Article 10a

The Commission shall examine what measures, if any, should be adopted to counter the problem of products constituting parasitic copies (look-alikes), of trademark and design-protected products, which do not infringe any intellectual or industrial property rights but which mislead consumers and could endanger public health.

Amendment 33
Article 11, paragraph 2

2. The judicial authorities may make the measures provided for in paragraph 1 subject to the lodging by the applicant of guarantees adequate to ensure possible compensation for the prejudice suffered by the defendant if the proceedings on the merits are subsequently judged to be unfounded.

Justification

See justification to the amendment to Article 8.

Amendment 34
Article 12

Without prejudice to the damages due to the right holder by reason of the infringement, Member States shall lay down that the judicial authorities may order the recall, at the infringer’s expense in appropriate cases, of the goods which have been found to infringe an intellectual property right.

In appropriate cases the national judge shall order the recall, at the right holder’s request and at the infringer’s expense, of the goods which have been found to infringe an intellectual property right.

The recall of goods may only be enforced against third parties operating in the course of trade.

Where such goods infringing an intellectual property right have been
intellectual property right have been purchased in good faith, recall of such goods may only be enforced if it is not wholly disproportionate.

The enforcement of the recall of goods may also take place by means of an interim measure.

Amendment 35
Article 13

Member States shall lay down that the judicial authorities may order that the goods which have been found to infringe an intellectual property right, as well as the materials and implements used primarily for the creation or the manufacture of the goods in question, be disposed of outside the channels of commerce, without any compensation being due.

By way of derogation from Article 14, Member States shall lay down that the judicial authorities may order that the goods which have been found to infringe an intellectual property right, as well as the materials and implements used primarily for the creation or the manufacture of the goods in question, be disposed of outside the channels of commerce, without any compensation being due, subject to the consultation and prior agreement of the right holder, who may set the conditions for the disposal of the goods.

Expenses for the transport and storage of these goods, including costs incurred as a result of interim measures, shall be borne by the infringer.

This measure shall not be available against a consumer acting in good faith.

Amendment 36
Article 14

Destruction of goods

Member States shall lay down that the judicial authorities may order the destruction of the goods which have been found to infringe an intellectual property right, without there being any entitlement to compensation.

Destruction of goods and equipment

Member States shall lay down that the judicial authorities may order the destruction, at the counterfeiter’s expense, of the goods which have been found to infringe an intellectual property right, as well as materials or implements used in the production or manufacture of such goods, without there being any entitlement
Where appropriate, the competent courts may also order the destruction of the technical devices used to commit the infringement. The cost of destruction of goods and technical devices shall, where appropriate, be borne by the infringer.

This measure shall not be available against private owners.

Amendment 37
Article 15

1. Member States shall lay down that, when a judicial decision has been taken finding an infringement of an intellectual property right, the judicial authorities may serve the infringer with an injunction aimed at prohibiting the continuation of the infringement. Non-compliance with an injunction shall be punishable by a fine accompanied, where applicable, by a recurring fine, with a view to ensuring compliance.

2. Member States shall ensure that right holders are able to apply for an injunction to be addressed to intermediaries whose services are used by third parties to infringe an intellectual property right.

3. However, in respect of intermediary service providers Articles 12 to 15 of Directive 2000/31/EC shall apply.

2. The measures referred to in Articles 10 and 15 shall be available against intermediaries where the conditions set out there are met and where this Article does not provide otherwise.

4. Non-compliance with an injunction shall be punishable by a fine accompanied, where applicable, by a recurring fine, with a view to ensuring compliance.

Amendment 38
Article 17, paragraphs 1 and 2

1. Member States shall lay down that the judicial authorities shall order an infringer to pay the right holder adequate damages in reparation of the damage incurred by the latter as a result of his intellectual property

2. Member States shall lay down that the judicial authorities shall order an infringer to pay the right holder adequate damages in reparation of the damage incurred by the latter as a result of his intellectual property
right being infringed through the infringer having engaged in an activity in the knowledge, or with reasonable grounds for knowing, that it would give rise to such an infringement.

To this end, the competent authorities shall award, at the request of the prejudiced party:

(a) either damages set at double the royalties or fees which would have been due if the infringer had requested authorisation to use the intellectual property right in question;

(b) or compensatory damages corresponding to the actual prejudice (including lost profits) suffered by the right holder as a result of infringement;

(c) or pre-established damages, provided that they are proportionate to the gravity of the infringement and sufficiently deterrent.

In appropriate cases, Member States shall lay down that the prejudice suffered can also be deemed to include elements other than economic factors, such as the moral prejudice caused to the right holder by the infringement.

2. In the case provided for in paragraph 1, point (b), Member States may provide for the recovery, for the benefit of the right holder, of all the profits made by the infringer which are attributable to that infringement and which are not taken into account when calculating the compensatory damages.

For calculating the amount of the profits made by the infringer, the right holder is bound to provide evidence only with regard to the amount of the gross income achieved by the infringer, with the latter being bound to provide evidence of his deductible expenses and profits attributable to factors

right being infringed by the infringer.

To this end, the competent authorities shall award, at the request of the prejudiced party:

(a) either damages corresponding to the actual prejudice (including lost profits) suffered by the right holder as a result of infringement;

(b) or damages set at double the royalties or fees which would have been due if the infringer had requested authorisation to use the intellectual property right in question;

(c) or pre-established damages, provided that they are proportionate to the gravity of the infringement and sufficiently deterrent.

In appropriate cases, Member States shall lay down that the prejudice suffered can also be deemed to include elements other than economic factors, such as the moral prejudice caused to the right holder by the infringement.

2. In the case provided for in paragraph 1, point (a), Member States may provide for the recovery, for the benefit of the right holder, of all the profits made by the infringer which are attributable to the infringement and which are not taken into account when calculating the damages.

For calculating the amount of the profits made by the infringer, the right holder is bound to provide evidence only with regard to the amount of the gross income achieved by the infringer, with the latter being bound to provide evidence of his deductible expenses and profits attributable to factors
Amendment 39
Article 18

Member States shall lay down that the legal costs, lawyer’s fees and any other expenses incurred by the successful party shall be borne by the other party, unless equity or the economic situation of the other party does not allow this. The responsible authorities shall determine the sum to be paid.

Justification

Takes account of Article 45(2) of the Trips Agreement and the particularities of the procedural law of various Member States.

Amendment 40
Article 19, paragraph 1

1. Member States shall lay down that, in legal proceedings instituted for infringement of an intellectual property right, the judicial authorities may order, at the request of the right holder and at the expense of the infringer, that the decision be displayed and published in full or in part in the newspapers designated by the right holder.

Amendment 41
Article 19, paragraph 2

2. Member States may also provide for other publicity measures which are appropriate to the particular circumstances.

Remote Readability

1. Member States shall lay down that, in legal proceedings instituted for infringement of an intellectual property right, the judicial authorities may order, at the request of the right holder and at the expense of the infringer, that the decision be displayed and published in full or in part in the media designated by the right holder, in compliance with the rules on the protection of natural persons with regard to the treatment of data of a personal nature.

2. Member States may provide for other additional publicity measures which are appropriate to the particular circumstances, including prominent advertising in the
Amendment 42
Article 19 a (new)

Article 19a

Member States should encourage awareness campaigns with a view to educating the public on the risks and problems associated with piracy and counterfeiting, as well as on the rights and obligations linked to online content usage and infringement.

Justification

Member States should encourage awareness campaigns with a view to educating the public on the risks and problems associated with piracy and counterfeiting as well as on the rights and obligations linked to online content usage and infringement.

Amendment 43
Article 20

1. Member States shall ensure that all serious infringements of an intellectual property right, as well as attempts at, participation in and instigation of such infringements, are treated as a criminal offence. An infringement is considered serious if it is intentional and committed for commercial purposes.

2. Where natural persons are concerned, Member States shall provide for criminal sanctions, including imprisonment.

3. As regards natural and legal persons, the Member States shall provide for the following sanctions:

(a) fines;

(b) confiscation of the goods, instruments and products stemming from the offences referred to in paragraph 1, or of goods
whose value corresponds to those products.

In appropriate cases, Member States shall also provide for the following sanctions:

(a) destruction of the goods infringing an intellectual property right;
(b) total or partial permanent or temporary closure of the establishment used primarily to commit the infringement;
(c) a permanent or temporary ban on engaging in commercial activities;
(d) placing under judicial supervision;
(e) judicial winding-up;
(f) a ban on access to public assistance or subsidies;
(g) publication of judicial decisions.

4. For the purposes of this Chapter, the term “legal person” shall be understood to mean any legal entity having such status under the applicable national law, except for States or any other public bodies acting in the exercise of their prerogative of public power, as well as public international organisations.

Amendment 44
Article 21

1. Without prejudice to particular provisions applicable in the field of copyright, related rights and the sui generis right of the creator of a database, Member States shall provide for appropriate legal protection against the manufacture, import, distribution and use of illegal technical devices.

2. For the purposes of this Chapter,

1. For the purposes of this Article, “technical device” means any technology, device or component designed to be applied to tangible products protected by an intellectual property right to facilitate the detection of counterfeit goods. “Illicit technical device” means any technology, device or component which misleads, is designed to deceive or is likely to mislead any person as to the authenticity of the tangible products concerned.

2. Member States shall provide for appropriate legal protection against:
(a) “technical device” means any technology, device or component which, in the normal course of its functioning, is designed for the manufacture of authentic goods and the incorporation therein of elements which are manifestly identifiable by customers and consumers and which make it easier to recognise the goods as being authentic.

(b) “illegal technical device” means any technical device which is designed to circumvent a technical device which permits the manufacture of goods infringing industrial property rights and incorporating the manifestly identifiable elements described in point (a).

(a) the manufacture, import, distribution, sale, hire, advertising for sale or hire, possession and use of illicit technical devices;

(b) the import or distribution of tangible products to which illicit technical devices have been applied or whose technical devices have been removed, tampered with or disabled;

(c) the application, on products that infringe intellectual property rights, of technical devices designed from the outset to be used by right-holders on authentic products;

(d) the act of removing, tampering with or disabling technical devices or circumventing them.

3. This Article shall apply to the technical devices applied to tangible products in the sense of physical objects, including their packaging, and not to digital goods. This Article shall be without prejudice to the provisions applicable in the area of copyright, associated rights and the sui generis rights of the manufacturer of a database.

4. Right holders shall remain free to use technical devices within the meaning of this Article.

Justification

To give this provision a more coherent structure.

Amendment 45
Article 21

1. Without prejudice to particular provisions applicable in the field of copyright, related rights and the sui generis right of the creator
of a database, Member States shall provide for appropriate legal protection against the manufacture, import, distribution and use of illegal technical devices.

2. For the purposes of this Chapter,

(a) “technical device” means any technology, device or component which, in the normal course of its functioning, is designed for the manufacture of authentic goods and the incorporation therein of elements which are manifestly identifiable by customers and consumers and which make it easier to recognise the goods as being authentic.

(b) “illegal technical device” means any technical device which is designed to circumvent a technical device which permits the manufacture of goods infringing industrial property rights and incorporating the manifestly identifiable elements described in point (a).

(b) have only a limited commercially significant purpose or use other than to circumvent, or

(c) are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of, any technical protective measures.

3. For the purposes of this Chapter,

(a) “technical device” means any technology, device or component which is used to apply apparent or hidden security or authentication elements or combinations thereof to a tangible or intangible product or its packaging, whereby the security or authentication elements which are applied to the product, otherwise associated with it or incorporated into it also constitute a
technical device;
(b) "infringement of a technical device" means:
- circumvention, i.e. technical violation by means of a technical device,
- a technical device which deceives as to the authenticity of a product, but without infringing the technical device itself,
- the removal of technical devices, or other action making them unusable, in order to commit an infringement of a commercial property right,
- the counterfeiting or imitation of a technical device and the use thereof in connection with products which infringe a commercial property right, in order to hide that fact,
- the use of genuine technical devices in connection with products which infringe a commercial property right, in order to hide that fact,
- information in any form about possible ways of disabling technical devices, except in cases where this happens for the purpose of scientific research.

Justification

This article should be aligned more closely with Article 6 of Directive 2001/29/EC. In addition, it is the security and authentication elements themselves which need protection, and not just the devices for applying them. All security and authentication elements are protected, irrespective of whether they are visible or concealed elements, or combinations of the two. It cannot depend on whether they are visible to consumers, since this would restrict the scope of protection too much. The definition of 'infringement of a technical device' is necessary in order to cover all conceivable forms of 'circumvention'.

Amendment 46
Article 21, paragraph 3 a (new)

3a. Where technical devices have the purpose or effect of restricting or eliminating legal competition, they shall not enjoy the protection laid down in this
Article. If the use of technical devices by third parties is necessary in order to maintain legal competition, such use shall then not be deemed illegal.

Justification

Technical devices fundamentally lend themselves to impairing or even completely eliminating legal commercial competition. Consequently, they may only be protected if they do not impair legal competition.

Amendment 47
Article 22, paragraph 1

1. Member States shall encourage:

(a) the development by trade or professional associations or organisations of codes of conduct at Community level aimed at contributing towards the enforcement of the intellectual property rights referred to in Article 2;

(b) the establishment, by optical disc manufacturers and the professional organisations concerned, of codes of conduct aimed at helping manufacturers to combat infringements of intellectual property, particularly by recommending the use on optical discs of a source code enabling the identification of the origin of their manufacture;

(c) the submission to the Commission of draft codes of conduct at national and Community level and of any evaluations of the application of these codes of conduct.

(b) the submission to the Commission of draft codes of conduct at national and Community level and of any evaluations of the application of these codes of conduct.

Justification

See amendment to Article 22a.
Amendment 48
Article 22, paragraph 1, point b a (new)

(ba) the use of a European database open to the public, for the exchange of information, both to assist enforcement authorities as well as to provide the consumers with information on the description and location of production, trade and producers of pirated and counterfeited products and goods, unless particular privacy reasons are invoked for not doing so.

Justification

The use of a database with the description and location of counterfeited material will facilitate the enforcement and traceability of infringements on intellectual property rights.

Amendment 49
Article 22 a (new)

Required inclusion of identification codes for optical discs

1. Member States shall provide for the professional manufacturers of optical discs containing, or capable of containing, elements protected by intellectual property rights, including master discs, to affix to such discs standardised codes common to the whole industry giving details of the establishment in which the master discs or copies of such discs were manufactured.

2. 'Optical storage discs' within the meaning of this Article are media on to which information is placed only at the time of manufacture, so that the information cannot be changed and cannot be over-written by the user. The use of codes for re-writable optical
storage discs shall remain unaffected, and shall not enjoy the protection afforded by paragraph 3 of this Article.

3. The Member States and Commission shall also encourage the manufacturers of optical discs and the professional organisations concerned to adopt codes of conduct as laid down in Article 22, to help such manufacturers of optical discs to combat infringements of intellectual property rights.

4. Article 21 shall apply by analogy.

Justification

The use of identification codes based on standards developed by the industry is a pro-active and economical way of fighting the pirating of optical discs at source. But such codes will not have the desired effect if they are applied on a voluntary basis. It is worth pointing out that Parliament called, in its resolution of 4 May 2000 on the Green Paper ‘Combating Counterfeiting and Piracy in the Single Market’, for the introduction of a requirement to use such codes on all optical discs produced or manufactured in the European Union.

Amendment 50
Article 23, paragraph 1

1. **Three** years after the date laid down in Article 26(1), each Member State shall submit to the Commission a report informing it of the situation with regard to implementation of this Directive.

On the basis of those reports, the Commission shall draw up a report on the application of this Directive, including an assessment of the effectiveness of the measures taken by the various competent bodies and instances, as well as an evaluation of its impact on innovation and the development of the information society. That report shall then be transmitted to the European Parliament, the Council and the European Economic and Social Committee. It shall be accompanied, if necessary, by proposals for amendments to this Directive.

The report shall be accompanied by statistics giving details of the number of cases of imitation and product piracy,
broken down by protection right and industrial sector, in the internal market. Following the initial submission thereof, statistics shall be drawn up and published every year.

That report shall then be transmitted to the European Parliament, the Council and the European Economic and Social Committee. It shall be accompanied, if necessary, by proposals for amendments to this Directive.

Justification

There are no figures concerning the phenomenon of imitation and product piracy in the internal market. The figures given in this proposal are based solely on estimates by interested parties in industry and on seizures by customs authorities at the Union’s external borders. These enable only very limited conclusions to be reached about the actual problem in the internal market, especially since there are also goods entering the internal market which are not intended for it at all. There is therefore an urgent need, in cooperation with the Member States and the industrial sectors concerned, to set up a system for collecting reliable data on imitation and product piracy in the internal market.

Amendment 51
Article 24, paragraph 1

1. Each Member State shall designate one or more correspondents (referred to hereinafter as “the national correspondents”) for any question relating to the implementation of the measures provided for by this Directive. It shall communicate the details of the correspondent(s) to the other Member States and to the Commission.

1. Each Member State shall designate one or more correspondents, including where appropriate one or more customs representatives (referred to hereinafter as “the national correspondents”) for any question relating to the implementation of the measures provided for by this Directive. It shall communicate the details of the correspondent(s) to the other Member States and to the Commission.

Justification

The interest of participation by the national customs is self-evident.
Amendment 52
Annex

This annex deleted.
EXPLANATORY STATEMENT

Commission proposal


The situation has worsened over the past three years and today all the industries may be said to be affected, even current consumer goods, in alarming proportions and increasingly as a result of organised crime.

According to European customs figures, seizures of illicit products rose by 39% between 2000 and 2001, and the counterfeiting of food products alone rose during this period by 75%. In the case of pirated CDs, their number has increased by 15 300% since 1999. In the Netherlands counterfeit pharmaceuticals have begun appearing on pharmacy shelves.

The software industry estimates the level of piracy at 35%, the audiovisual industry at 25%, the toy industry is facing counterfeiting of 12% and about 40% of CDs, cassettes and other recorded music are counterfeits.

The proposal’s aim is to standardise national laws on the methods of enforcing intellectual property rights and define a general framework for exchanging information between the relevant national authorities.

The proposal covers infringements of all intellectual property rights (both copyright and industrial property rights, trademarks, designs and models) that have been harmonised within the EU.

According to the Commission it will safeguard identical conditions for right-holders throughout the EU, tighten up measures against infringers and thus act as a deterrent against counterfeiters and pirates. It is intended to supplement the recent proposal for a regulation to facilitate the seizure by customs of counterfeit goods originating outside the Community, on which Parliament has not been consulted.

The proposal is based on the good practice already identified in the Member States’ laws that have proved the most effective. The measures that Member States are asked to take include orders to end the sale of counterfeit or pirated goods, and empowering the legal authorities to obtain evidence and require infringers to compensate right-holders. Member States must also ensure that any serious infringements of intellectual property rights are classified as criminal offences punishable by criminal penalties.

The Commission considers that it is crucial to take firm action against the ‘major’ offenders, and so the proposal only concerns infringements committed for commercial purposes or doing considerable damage to right-holders.

In the Commission’s view the approach that the proposal takes goes beyond the Agreement on Trade-Related Aspects of Intellectual Property Rights, or ‘Trips Agreement’. This
agreement provides for minimal provisions that must apply to all EU Member States to enforce intellectual property rights.

The rapporteur’s approach

Having heard the interest groups concerned – the telecommunications industry, access suppliers, manufacturers of pharmaceuticals and vehicle spares, several consumer organisations, the music and software industries, publishing, journalism and so on – the rapporteur has endeavoured to take account of their legitimate concerns, with due regard for the inevitable political, practical and legal constraints and its primary aim, to provide the greatest possible protection from acts of counterfeiting and piracy.

So it would be more appropriate to widen the scope, in accordance with the Trips Agreement, to include protection of the legitimate interests of right-holders, while maintaining the directive’s highly dissuasive character in the case of counterfeiting and piracy in the proper sense of the word.

Perhaps it needs saying that the directive will not apply only to piracy and counterfeiting but to any infringement of intellectual property rights. For this reason the rapporteur has tabled some amendments to ensure that the penalties and provisional measures will be applied in a graduated and proportionate way, taking into account whether or not the infringement was deliberate, so as to prompt judges to use their powers of assessment when facing cases of infringement that are not properly acts of counterfeiting or piracy. The provision on damages and compensation has been adjusted in the same spirit.

On the matter of patents the rapporteur proposes excluding them from the directive’s scope, since the European Patent Convention is the sole text in force at present and the question of patent protection is such a complex and delicate issue that it deserves a specific text, perhaps following adoption of the text on the Community patent.

Bearing in mind the concerns of the telecommunications and access supply industries and in the interest of legal certainty the rapporteur believes it is worth spelling out explicitly that the directive does not affect the provisions concerning Directive 2000/31/EC, particularly those relating to the liability of service-providers.

As to the provisions of civil and administrative law and relating to the law of evidence, these have been partially amended so as not to overly disrupt national law and, more especially, with the aim of preventing effective procedures for combating infringements of intellectual property rights from disappearing from the scene.

Changes have also been made to the wording with the aim of protecting the confidentiality of journalists’ sources and the treatment of personal data.

After much thought the rapporteur has decided, in view of the present legal uncertainty – pending the Court of Justice ruling on a text on environmental liability – and the reluctance of Member States, to propose a minimalist provision on criminal penalties in the hope that recent and forthcoming developments on this issue will eventually make it possible to introduce them, either in this directive or, if necessary, by means of a framework decision under the Third Pillar.
The rapporteur is also proposing amendments on establishing a code of conduct, so as to involve consumers and Internet access providers in its wording, as working together is the best way of reaching solutions.

Finally, there is a need for the industry to have the means to deal with the many infringements of intellectual property rights to which it is subject. So effective technical devices are needed, complying with market rules and providing the necessary consumer information.

The rapporteur hopes that her balanced approach will receive the Committee’s full attention. She will of course be pursuing her talks with the shadow rapporteurs, draftsperson, interested Members, the Commission and the Italian Presidency to reach the speediest and most acceptable conclusion possible.
OPINION OF THE COMMITTEE ON INDUSTRY, EXTERNAL TRADE, RESEARCH AND ENERGY

for the Committee on Legal Affairs and the Internal Market

on the proposal for a European Parliament and Council directive on measures and procedures to ensure the enforcement of intellectual property rights

Draftsman: Luis Berenguer Fuster

PROCEDURE

The Committee on Industry, External Trade, Research and Energy appointed Luis Berenguer Fuster draftsman at its meeting of 20 March 2003.

It considered the draft opinion at its meetings of 10 June and 2 October 2003.

At the latter meeting it adopted the following amendments by 37 votes to O, with 1 abstention.

The following were present for the vote: Peter Michael Mombaur, chairman; Yves Piétrasanta, vice-chairman; Luis Berenguer Fuster, draftsman; Sir Robert Atkins, Gérard Caudron, Giles Bryan Chichester, Nicholas Clegg, Willy C.E.H. De Clercq, Harlem Désir, Carlo Fatuzzo (for Guido Bodrato), Concepció Ferrer, Francesco Fiori (for Bashir Khanbhai), Christos Folias (for Angelika Niebler), Norbert Glante, Michel Hansenne, Werner Langen, Rolf Linkohr, Caroline Lucas, Eryl Margaret McNally, Erika Mann, Marjo Matikainen-Kallström, Ana Clara Maria Miranda de Lage, Bill Newton Dunn (for Colette Flesch), Seán Ó Neachtain, Reino Paasilinna, Paolo Pastorelli, Elly Plooij-van Gorsel, John Purvis, Godelieve Quisthoudt-Rowohl, Imelda Mary Read, Mechtild Rothe, Christian Foldberg Rovsing, Paul Rübig, Konrad K. Schweiger, Esko Olavi Seppänen, W.G. van Velzen, Myrsini Zorba and Olga Zrihen Zaari.
SHORT JUSTIFICATION

I. Introduction

The aim of this proposal for a directive is to harmonise the Member States' laws, regulations and administrative provisions on methods of protecting intellectual property rights and ensuring that these rights enjoy an equivalent level of protection throughout the internal market. It also draws up a general framework for the exchange of information between the competent national authorities. The directive seeks to prevent the disparities between the national systems of penalties from hampering the proper functioning of the internal market.

The directive is also intended to ensure that all those involved in the infringement are pronounced responsible according to the internal law of the Member States, and that the Member States are obliged to provide for penalties in appropriate cases. As the Commission itself states, the directive is intended to complete the internal market in the field of intellectual property (enforcing substantive law, promoting freedom of movement and ensuring fair competition, etc.), as well as meeting the needs of a modern economy and protecting society (promoting innovation and business competitiveness, preservation and development of the cultural sector, preventing tax losses and market destabilisation, etc.).

II. Draftsman's position

Although the proposal for a directive partly addresses the problems described above, there are various aspects which need improvement, in particular:

– it should be made clear that infringements of intellectual property rights must constitute an act of counterfeiting;

– with regard to the scope of the directive (Article 2), the concept of ‘commercial purposes’ must be clearly defined, removing the reference to quantification of harm, which could impair the holder's rights;

– the requirement to provide information must be backed up by appropriate sanctions (Article 9);

– in the difficult field of provisional measures (Article 10), there is a need to specify clearly the requirements for the adoption of provisional measures, define the mechanisms needed to prevent abuse of intellectual property rights (particularly as regards patent rights) and prevent provisional measures from being used to expel competitors from the market;

– there is also a need to firm up some of the provisions on reimbursement of expenses (Articles 13 and 14), add a provision to remove the good faith exemption for owners of counterfeit goods and include among the penalties the destruction of illegal technical equipment used for counterfeiting purposes (Article 20).
AMENDMENTS

The Committee on Industry, External Trade, Research and Energy calls on the Committee on Legal Affairs and the Internal Market, as the committee responsible, to incorporate the following amendments in its report:

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(10) The objective of this Directive is to approximate legislative systems so as to ensure a high, equivalent and homogeneous level of protection in the Internal Market.

This protection is essential against infringements carried out on for commercial purposes or which cause significant harm to the right holder, apart from minor and isolated infringements.

Justification

The measures set out in the proposal for a directive are intended to provide judicial protection for intellectual property rights. They should apply in principle to any infringement of these rights. However, Member States must be able to take decisions in a graduated manner above individual penalty mechanisms. It must be also be made clear that the national courts must take due account of the specific characteristics of individual cases.

Amendment 2

Recital 12

(12) This Directive shall not affect the application of the rules of competition, and in particular Articles 81 and 82 of the Treaty.

(12) This Directive shall not affect the application of the rules of competition, and in particular Articles 81 and 82 of the Treaty. Furthermore, the measures provided for in this Directive must not be used to prevent competition.

1.
Justification

It must be made clear that the enforcement of intellectual property rights will not be used as a pretext to exclude competitors from the market. This would damage competition within the European Union and also bring the justified enforcement of intellectual property rights into disrepute.

Amendment 3
Recital 13

(13) It is necessary to define the scope of this Directive as widely as possible in order to encompass all the intellectual property rights covered by Community provisions in this field and by the resulting national provisions, while excluding certain activities which do not involve intellectual property in the strict sense. Nevertheless, that requirement does not affect the possibility, on the part of those Member States which so wish, to extend, for internal purposes, the provisions of this Directive to include acts involving unfair competition or similar activities.

Justification

It is important to emphasise here the crucial importance of improving the availability of existing instruments for combating counterfeiting and piracy.

Amendment 4
Recital 13 a (new)

(13 a) The aim of this directive is to prosecute piracy and counterfeiting, but penalties and compensation should only apply in settling intellectual property disputes where infringements entail deliberate and fraudulent acts.

Justification

The amendment takes up the idea by the rapporteur to keep the focus of the Directive on combating counterfeiting and piracy, but not to intervene in other disputes involving
This Directive concerns the measures necessary to ensure the enforcement of intellectual property rights in the event of acts of counterfeiting and piracy.

**Justification**

*It must be made clear that the aim of this directive is to combat counterfeiting and piracy, not to intervene in other disputes concerning intellectual property rights.*

**Amendment 6**

Article 2, paragraph 1

1. Without prejudice to the means which are or may be provided for in Community or national legislation, in so far as those means may be more favourable for right holders, the measures provided for by this Directive shall apply to any infringement of the rights deriving from Community and European acts on the protection of intellectual property, as listed in the Annex, and from the provisions adopted by the Member States in order to comply with those acts when the infringement is committed for commercial purposes or causes significant harm to the right holder, provided that the infringement in question constitutes an act of counterfeiting.

Member States shall ensure in this connection that the judicial authorities take due account of the specific characteristics of each individual case in choosing penalties and the modalities thereof.
Justification

Attempting to quantify the harm done may give rise to differing interpretations and at the same time impair the holder’s rights. See also the justification to Amendment 1.

Amendment 7
Article 2, paragraph 1a (new)

1a. For the purposes of this directive, counterfeiting shall be deemed to exist when an intellectual property right is deliberately and fraudulently infringed.

Justification

It must be made clear that the aim of this directive is to combat counterfeiting and piracy, not to intervene in other disputes concerning intellectual property rights.

Amendment 8
Article 2, paragraph 1b (new)

1b. For the purposes of this directive, anyone in possession of such quantities or varieties of counterfeit goods that their possession cannot reasonably be explained on other grounds shall be assumed to have commercial purposes.

Justification

The aim is to establish a 'iuris tantum' presumption of commercial purposes. Anyone who has in his possession significant quantities and varieties of counterfeit goods must be presumed to have commercial purposes.

Amendment 9
Article 2, paragraph 3

3. This Directive shall not affect Directive 2000/31/EC, and in particular the provisions in Articles 12 to 14 of the Directive. Thus, for the purpose of the
present Directive, intermediary service providers whose role is limited to the activities specified in Articles 12 to 14 of Directive 2000/31/EC shall not be considered as infringers, or participants in an infringement.

3 a. This Directive shall not affect:

a) the Community provisions governing the substantive law on intellectual property, Directive 95/46/EC, Directive 1999/93/EC or Directive 2000/31/EC;

b) Member States’ international obligations and notably the Agreement on Trade-Related Aspects of Intellectual Property Rights (the "TRIPS Agreement").

Justification

The amendment clarifies the relationship between the present Directive and the E-Commerce Directive. The E-Commerce Directive’s provisions on intermediary liability are the result of detailed and lengthy discussions and a careful compromise that should not be reopened.

Amendment 10
Article 3, paragraph 2

These measures and procedures shall be such as to remove from those responsible for an infringement of an intellectual-property right the economic benefits of that infringement. They shall be fair and equitable, and shall not be unnecessarily complicated or costly, nor entail unreasonable time-limits or unwarranted delays.

Justification

If the directive is to prove successful, it is important that the measures provided should have a
clearly deterrent effect on counterfeiters and perpetrators of piracy. At the same time, it is necessary to ensure an approach based on the principle of proportionality.

Amendment 11
Article 4

Member States shall ensure that any infringement of an intellectual property right covered by Article 2 is punishable by penalties. These penalties must be effective, proportionate and deterrent.

Justification
This deletion follows on from the proposed amendment to Article 3.

Amendment 12
Article 5, paragraph 1

1. Member States shall recognise as persons entitled to apply for application of the measures referred to in this Chapter the holders of intellectual property rights, as well as all other persons authorised to use those rights in accordance with the applicable law, or their representatives.

Justification
The current text allows all persons entitled to use IP rights to apply for measures. This should be limited to the owner of an intellectual property right.

Amendment 13
Article 7, paragraph 1

1. Member States shall lay down that, where a party has presented reasonably accessible evidence sufficient to support its claims, and has, in substantiating those claims, cited evidence which is to be found under the control of the opposing party, the judicial authorities may order that such evidence be produced by the opposing party, subject to the protection of confidential information.

1. Member States shall lay down that, where a claimant alleging infringement of intellectual property rights covered by this Directive has presented to a court which, in the court’s view, is sufficient to support its claims and has specified evidence relevant to substantiation of its claims which lies in the control of the infringer, the judicial authorities may, in appropriate cases and in proportionate manner, order that this evidence be produced by the opposing party,
provided that the protection of confidential information is assured.

Justification

In order to reach a high level of legal certainty and a minimum of false allegations, the standard of proof has to be high, because disproportionate evidence production would become a burden on intermediaries.

Amendment 14
Article 9, paragraph 1

1. Member States shall lay down that, in order to deal with proceedings involving an infringement of an intellectual property right, or in response to a request for provisional or precautionary measures, the judicial authorities shall order, at the request of the right holder, unless particular reasons are invoked for not doing so, any person to provide information on the origin of the goods or services which are thought to infringe an intellectual property right and on the networks for their distribution or provision, respectively, if that person:

Member States shall lay down that, in order to deal with proceedings involving an infringement of an intellectual property right, or in response to a request for provisional or precautionary measures, the judicial authorities may order, in response to a justified and proportionate request submitted by the applicant, unless particular reasons are invoked for not doing so, any person to provide available information in accordance with applicable judicial procedures on the origin of the goods or services which are thought to infringe an intellectual property right and on the networks for their distribution or provision, respectively, if that person:

Justification

Whether a request to obtain evidence is proportionate and justified, in particular in terms of the invasion of an individual’s privacy, the damage caused to the rightsholder and the value of evidence to any legal proceedings the rightsholder intends to pursue, is for the courts and recognised public authorities to determine.

Amendment 15
Article 9, paragraph 2a (new)

2a. Member States shall establish appropriate penalties for persons who find
themselves in the circumstances described in paragraph 1 but refuse to provide information or fail to do so fully.

Justification

The obligation to provide information needs to be backed up by penalties for failure to comply, since an obligation not subject to penalties is merely a moral obligation.

Amendment 16

Article 9, paragraph 3(d)

(d) afford an opportunity for refusing to provide information which would force the person referred to in paragraph 1 to admit to the existence of an infringement of an intellectual property right.

Justification

Some countries have a right to non-self incrimination, which also applies to administrative cases and legal persons.

Amendment 17

Article 10, paragraph 1, second paragraph

The judicial authorities shall be empowered to require the applicant to provide any reasonably available evidence in order to satisfy themselves with a sufficient degree of certainty that the applicant is the right holder and that the applicant's right is being infringed or, that such infringement is imminent.

Justification

The requirements for the adoption of provisional measures must be clearly spelled out: 'fumus boni iuris' (where appropriate, 'fumus delicti comissi') and 'periculum in mora'.
Amendment 18
Article 10, paragraph 1a (new)

1a. In the case of provisional measures based on an infringement of patent rights, provisional measures may not be adopted unless an expert assessment has been undertaken clearly showing, if only circumstantially, an apparent infringement.

Justification

For infringements of patent rights, stricter procedures are required, even for provisional measures, and must entail full guarantees.

Amendment 19
Article 10, paragraph 2, first subparagraph

2. Member States shall lay down that the provisional measures referred to in paragraph 1 may in appropriate cases be taken without the defendant having been heard, in particular when any delay would cause irreparable prejudice to the right holder. In the event of this happening, the defendant shall be so informed without delay after the execution of the measures.

Justification

As regards injunctions (10.1), these measures should not be used routinely, and the burden of proof should therefore be reinforced for the right holder who is allegedly the victim of an infringement. Article 3 of the proposal for a directive provides that the general principles of intellectual property law ‘must avoid the creation of barriers to legitimate trade’; we believe that injunctions must not be used as a means of removing awkward competitors from the market or to hamper legitimate competition. Unless this article is amended, the applicant will be able to obtain an injunction easily on the basis of minimal or un-corroborated evidence. The result (for the applicant) is a cheap, simple and commercially extremely valuable means of immediately blocking legitimate competition, without having recourse to an actual lawsuit.

As regards the amendment which reduces the time for the review (10.2), it must be borne in mind that an injunction is an extremely serious measure and thus should only be granted where there exists a presumption that the applicant will rapidly institute legal proceedings on the merits of the case. Finally, the guarantee clauses (10.4) intended to protect innocent
people from abusive litigation should be strengthened as much as possible.

Amendment 20
Article 10, paragraph 3

3. Member States shall lay down that a prohibitory measure shall be revoked if the applicant does not institute proceedings leading to a decision on the merits of the case within thirty-one calendar days from the day on which the right holder became aware of the facts on which it is based.

3. Member States shall lay down that a prohibitory measure shall be revoked if the applicant does not institute proceedings leading to a decision on the merits of the case within thirty-one calendar days from the day on which the prohibitory measure was agreed.

Justification

As regards injunctions (10.1), these measures should not be used routinely, and the burden of proof should therefore be reinforced for the right holder who is allegedly the victim of an infringement. Article 3 of the proposal for a directive provides that the general principles of intellectual property law ‘must avoid the creation of barriers to legitimate trade’; we believe that injunctions must not be used as a means of removing awkward competitors from the market or to hamper legitimate competition. Unless this article is amended, the applicant will be able to obtain an injunction easily on the basis of minimal or un-corroborated evidence. The result (for the applicant) is a cheap, simple and commercially extremely valuable means of immediately blocking legitimate competition, without having recourse to an actual lawsuit.

As regards the amendment which reduces the time for the review (10.2), it must be borne in mind that an injunction is an extremely serious measure and thus should only be granted where there exists a presumption that the applicant will rapidly institute legal proceedings on the merits of the case. Finally, the guarantee clauses (10.4) intended to protect innocent people from abusive litigation should be strengthened as much as possible.

Amendment 21
Article 10, paragraph 5, paragraph 1a (new)

The laws of the Member States shall provide for the possibility of increasing this compensation up to double the amount of the damage caused, if the competent court believes that the application was improper. In any case, an application shall be deemed improper if the applicant has had similar complaints.
repeatedly rejected within the territory of the Union.

Justification

Efforts to strengthen the procedures available to intellectual property rights holders must be accompanied by other measures to prevent improper use of that right.

Amendment 22
Article 10, paragraph 5a (new)

5a. The Member States shall draw up appropriate laws to prevent provisional measures from being used improperly or unfairly to expel competitors or other affected economic operators from the market or make it difficult for them to operate.

In any case, the Member States shall make provision for cases where the adoption of provisional measures may be suspended at the request of a court or competent authority, if there is reliable evidence that the provisional measure was requested for anti-competitive or unfair purposes.

Justification

Experience has shown that intellectual rights protection procedures are sometimes used for anti-competitive purposes.

Amendment 23
Article 13

Member States shall lay down that the judicial authorities may order that the goods which have been found to infringe an intellectual property right, as well as the materials and implements used primarily for the creation or the manufacture of the goods in question, be disposed of outside the channels of commerce, without any compensation being due.

They shall also adopt measures to ensure that expenditure on the transport and storage of goods,
including those produced as a result of provisional measures, is borne by the infringer.

Justification

It must be made clear that all expenditure occasioned by the transport and storage of goods should be borne by the infringer, otherwise the right holder would be unjustifiably penalised.

Amendment 24
Article 14

Destruction of goods

Member States shall lay down that the judicial authorities may order the destruction of the goods which have been found to infringe an intellectual property right, without there being any entitlement to compensation.

Justification

In the interests of complete protection from counterfeiting and piracy, the technical appliances used should also be destroyed, where appropriate. Steps must be taken to ensure that the costs of these measures are borne by the infringer of an intellectual property right.

Amendment 25
Article 14a (new)

Article 14a

Exclusion of good faith exemption

The Member States shall provide that the owners of counterfeit goods which have
had to be withdrawn from circulation or destroyed pursuant to the two previous articles may not claim exemption on grounds that they acquired the goods in good faith.

Justification

Anyone acquiring counterfeit goods is at fault for failing to take full precautions and, although he may not be held responsible, he may not prevent the destruction or withdrawal from circulation of the goods on grounds of good faith.

Amendment 26
Article 17, paragraph 1, second paragraph, letter (b)

(b) or compensatory damages corresponding to the actual prejudice (including lost profits) suffered by the right holder as a result of the infringement.

(b) or compensatory damages corresponding to double the actual prejudice (including lost profits) suffered by the right holder as a result of the infringement.

Justification

The principle of doubling the damages should be included in both paragraphs.

Amendment 27
Article 20, paragraph 3, second paragraph, letter (b)

(b) total or partial permanent or temporary closure of the establishment used primarily to commit the infringement;

(b) total or partial permanent or temporary closure of the establishment used, or at which counterfeit goods were repeatedly sold to commit the infringement;

Justification

The word 'primarily' should be deleted since it leaves the way open for discussion of which was the main establishment in cases where there were several. The provision should relate to the establishment where the counterfeit goods are sold.

Amendment 28
Article 20, paragraph 3, second paragraph, letter (b a) (new)

(b a) destruction of technical equipment used primarily to commit an infringement.
Justification

*In the interests of full protection against counterfeiting and piracy, the technical appliances used should also be destroyed where appropriate.*
ALTERNATIVE WORDING FOR AND COMMENTS ON THE FIRST SUBPARAGRAPH OF ARTICLE 5(2) OF THE COMPROMISE PROPOSAL PRESENTED BY THE PRESIDENCY OF THE COUNCIL OF THE EUROPEAN UNION IN 14862/03 PI 116 CODEC 1618, DATED 14 NOVEMBER 2003

Article 5(2) - Alternative text proposed

Member States shall confer upon intellectual property rights collecting societies or professional defence bodies that represent intellectual property right holders, or other persons authorised to use these rights according to the applicable law, the capacity to seek application of the measures and procedures referred to in this Chapter, including the capacity to initiate legal proceedings for the defence of those rights or of the collective or individual interests for which they are responsible.
RATIONALE

1. **Inadmissibility of the requirement that collecting societies should have a mandate from the holders of copyright and related rights in order to be entitled to seek application of the measures and procedures referred to in the Directive.**

Holders of copyright and related rights face the problem of controlling the widespread use of their works and performances, which it is generally impossible to do personally.

The works and performances of the rightholders can be enjoyed by many people simultaneously, as a result of spectacular technological progress both in the media used for their reproduction and in those by which they are conveyed to the public, which makes it impossible for the rightholders themselves to exploit them and makes it necessary for management of the rights concerned to be handled by collecting societies in order to be really effective.

Both the World Intellectual Property Organisation (WIPO) and the European Union acknowledge the desirability of having copyright and related rights managed by collecting societies when such rights cannot in practice be exercised because of the number of uses or where personal management would be very burdensome for the holders because of widespread use.

The need for collecting societies to enforce copyright and related rights is in turn closely connected with the objective fact that those bodies in many cases represent thousands of rightholders.

Both circumstances mean that it would be extremely burdensome for the copyright and related rights collecting societies if they had to bring before the courts thousands of mandates or contracts agreed with the rightholders they represent in order to confirm the capacity granted by those rightholders.
The collecting societies, inasmuch as they are entrusted with the defence of collective interests and the exploitation of works and performances for widespread use, should therefore be provided with the necessary capacity to defend and protect the rights which they represent and should therefore be exempt from the obligation to prove that they represent each and every one of the rightholders whose rights they manage.

2. Moreover, it must be stressed that Community legislation itself provides that in certain circumstances copyright and related rights can only be exercised through a collecting society.

Thus, for example, Article 9(1) of Council Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission provides that:

"Member States shall ensure that the right of copyright owners and holders of related rights to grant or refuse authorisation to a cable operator for a cable retransmission may be exercised only through a collecting society."

It is contradictory and in our view inadmissible that, on the one hand, rights should exist which Community law itself requires to be collectively managed through collecting societies, and which those societies are therefore empowered to exercise as a direct consequence of that law, and that, on the other hand, those same societies should be required to produce a mandate from the rightholders in order to be able to call on the resources and procedures set out in the proposed Directive to defend those rights.
COUNCIL OF THE EUROPEAN UNION

Brussels, 19 December 2003

16289/03

LIMITE

PI 134
CODEC 1864

WORKING DOCUMENT

from : Presidency

to : Working Party on Intellectual Property

No. prev. doc.: 15295/03 ADD 1 PI 125 CODEC 1674

No. Coin prop.: 6777/03 PI 19 CULT 17 CODEC 204

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 – Consolidated/annotated text

Delegations will find in Annex a consolidated/annotated version of the proposed Directive mentioned above, following discussions in the Working Party under the Italian Presidency.

The amendments in relation to 14862/03 and 15295/03 are indicated.
CHAPTER I

OBJECTIVE AND SCOPE

Article 1

Subject-matter

This Directive concerns the measures and procedures necessary to ensure the enforcement of intellectual property rights.

Article 2

Scope

1. Without prejudice to the means which are or may be provided for in Community or national legislation, in so far as those means may be more favourable for right holders, the measures and procedures provided for by this Directive shall apply to any infringement of the following intellectual property rights: copyright, rights related to copyright, sui generis rights of a database manufacturer and of the creator of the topographies of a semiconductor product, trademarks, patents, including supplementary protection certificates,1 geographical indications, including indications of origin,2 designs, utility models3 and plant variety rights,4 to the extent that protection of these rights is provided for by Community

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1 NL, A, P, DK, UK, IRL : reservation on "patents, including supplementary protection certificates".
2 DK, UK, A, P, I : reservation on "geographical indications, including indications of origin".
3 F, I, NL, P, IRL : reservation on "utility models".
4 UK, P, NL : reservation on "and plant variety rights".
law or by the national law of the Member State concerned. In this respect, Member States shall ensure that the judicial authorities take due account of the specific characteristics of each case, including the intentional or unintentional character of the infringement, when determining the applicable sanctions or other measures.

2. This Directive shall be without prejudice to the particular provisions on the enforcement of rights and on exceptions contained in Community legislation concerning copyright and rights related to copyright, notably those found in Directive 2001/29/EC and, in particular, Articles 2 to 5 and Article 8 thereof.

3. This Directive shall not affect:

(a) the Community provisions governing the substantive law on intellectual property, Directive 95/46/EC, Directive 1999/93/EC or Directive 2000/31/EC in general, and the provisions of Articles 12 to 15 in particular of that Directive;

(b) Member States’ international obligations and notably the Agreement on Trade-Related Aspects of Intellectual Property Rights (the “TRIPS Agreement”).

Scrutiny reservation by several delegations on the whole list until the legal consequences of including in this list intellectual property rights the substance of which has not yet been harmonised at Community level have been clarified.

The scope of the Directive should be limited to cases where the infringement is committed for commercial purposes or causes significant harm to the right holder. For NL, the scope should be limited to cases of serious and systematic infringements committed on a commercial scale and in bad faith. I, EL, E, B, D, S, UK could accept a broad scope of the Directive in Article 2 on condition that the application of some of the measures provided for by the various Articles of the draft Directive shall be limited to serious infringements, committed on a commercial scale or that it be explicitly provided that their application shall be proportional to the seriousness of the infringement.

reservation on the relevance of the last sentence with the contents of paragraph 1.

reservation on "and, in particular, Articles 2 to 5 and Article 8 thereof".

reservation on "and the provisions of Articles 12 to 15 in particular of that Directive".

need to make a reference here also to Council Regulation (EC) N° 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, 2.8.2003, p. 7) (hereafter referred to as "the Customs Regulation").

reservation on the need for point (b).
CHAPTER II

MEASURES AND PROCEDURES

SECTION 1

GENERAL PROVISIONS

Article 3

General obligation

Member States shall provide for the measures, procedures and sanctions needed to ensure the enforcement of the intellectual property rights covered by this Directive. These measures, procedures and sanctions shall be fair and equitable, and shall not be unnecessarily complicated or costly, nor entail unreasonable time-limits or unwarranted delays.

The measures and sanctions shall also be effective, proportionate and dissuasive and shall be applied in such a manner as to avoid the creation of barriers to legitimate trade.

Article 4

Penalties

Merged with Article 3.
Article 5

Persons entitled to apply for the application of the measures and procedures

1. Member States shall recognise as persons entitled to seek application of the measures and procedures referred to in this Chapter the holders of intellectual property rights, as well as all other persons authorised to use those rights in accordance with the applicable law, or their representatives. This entitlement shall [...] be accorded to [...] licensees and sub-licensees or their representatives in so far as permitted by and in accordance with the provisions of the applicable law.

2. Paragraph 1 shall apply mutatis mutandis to rights management bodies, federations, and associations having legal standing to assert such rights, regardless of the Member State in which the rights management body, federation or association is established.

Article 6

Presumption of authorship

Until proved otherwise, authorship of a work shall be presumed to be vested in the person whose name, presented as being that of the author, is featured on the work, or whose authorship is referred to on the work by way of a statement, label or other mark.

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12 A, P : general reservation on the need for Article 5.
13 B, NL : general reservation on the need for Article 6.
SECTION 2

EVIDENCE

Article 7

Evidence

1. Member States shall lay down that, on application by a party which has presented reasonably accessible evidence sufficient to support its claims, and has, in substantiating those claims, cited evidence which is to be found under the control of the opposing party, the competent judicial authorities may order that such evidence be produced by the opposing party, subject to the protection of confidential information.

2. Under the same conditions and in order to identify those directly involved in an infringement carried out on a commercial scale, Member States shall take such measures as are necessary to enable the competent judicial authorities to order, at the request of the plaintiff, the communication [...] of banking, financial or commercial documents under the control of the defendant, subject to the protection of confidential information.

Article 8

Measures for protecting evidence

1. Member States shall lay down that [...] even before the commencement of proceedings on the merits of the case the competent judicial authorities may, [...] on application by a party who alleges that his intellectual property right has been infringed or is about to be
infringed and that it is necessary to preserve relevant evidence, authorise in any place\textsuperscript{14} either the detailed description, with or without the taking of samples, or the physical seizure\textsuperscript{15} of the infringing goods, and, in appropriate cases, the equipment and materials used in the production and/or distribution of these goods and the documents relating thereto.\textsuperscript{16} These measures shall be taken by order issued on application, if necessary without the other party having been heard, in particular where there is a demonstrable risk that evidence may be destroyed.

Where evidence-protection measures have been adopted without the other party having been heard, the affected parties shall be given notice immediately after the execution of the measures at the latest. A review, including a right to be heard, shall take place upon request of the affected parties with a view to deciding, within a reasonable period after the notification of the measures, whether the measures shall be modified, revoked or confirmed.\textsuperscript{17}

2. Member States shall lay down that physical seizure may be subject to the applicant’s lodging of an adequate security or equivalent assurance intended to ensure compensation for any prejudice suffered by the defendant as provided for in paragraph 4.\textsuperscript{18}

3. Member States shall lay down that the seizure shall be revoked at the request of the defendant, without prejudice to the damages which may be claimed, if the applicant has not instituted legal proceedings leading to a decision on the merits of the case before the competent judicial authority within a reasonable interval, which shall be specified by the judicial authority ordering the measures when the law of a Member State permits or, in the absence of such specification, within an interval not exceeding 20 working days or 31 calendar days if longer.

\textsuperscript{14} S : reservation on "in any place".
\textsuperscript{15} D, NL : reservation on "or the physical seizure".
\textsuperscript{16} S : add "subject to the protection of confidential information".
\textsuperscript{17} NL, E, D, S, DK, UK : reservation on paragraph 1, on the grounds that it is too detailed.
\textsuperscript{18} FIN, E : paragraph 2 should cover not only seizure but all the measures provided for in paragraph 1. For FIN, the lodging of adequate guarantees should be mandatory rather than be left to the discretion of the courts.
4. Where the evidence protection measures have been revoked, or where they lapse owing to any act or omission by the applicant, or where it is subsequently found that there has been no infringement or threat of infringement of any intellectual property right, the judicial authorities shall be empowered to order the applicant, at the defendant’s request, to provide the defendant with adequate compensation for any injury caused by the measures.

SECTION 3

RIGHT OF INFORMATION

Article 9

Right of information

1. Member States shall lay down that, in the context of proceedings concerning an alleged infringement of an intellectual property right, or in order to comply with a request for provisional or precautionary measures\(^{19}\), the competent judicial authorities may order, at the request of the right holder or of other persons or bodies referred to in Article 5, in appropriate cases and unless particular reasons are invoked for not doing so, any person\(^{20}\) to provide information on the origin of the goods or services which are alleged to infringe an intellectual property right and on the networks for their\(^{21}\) distribution or provision, respectively, if that person:

(a) was found in possession, for commercial purposes, of the infringing goods;

(b) was found to be using the infringing services for commercial purposes;

\(^{19}\) NL: reservation on "or in order to comply with a request for provisional or precautionary measures".

\(^{20}\) NL, D, L, B, E, P: reservation on applying Article 9 to persons who have not been parties to the proceedings.

\(^{21}\) E: insert "production,".
(ba) was found to be providing for commercial purposes services used in infringing activities; or

(c) was indicated by the person referred to in point (a), (b) or (ba) as being involved in the production, manufacture or distribution of the goods or the provision of the services.

2. The information referred to in paragraph 1 shall comprise:

(a) the names and addresses of the producers, manufacturers, distributors, suppliers and other previous holders of the goods or services, as well as the intended wholesalers and retailers;

(b) information on the quantities produced, manufactured, delivered, received or ordered, as well as the price obtained for the goods or services in question.\(^{22}\)

3. Paragraphs 1 and 2 shall apply without prejudice to other statutory provisions which:

(a) grant the right holder rights to receive fuller information;

(b) govern the use in civil or criminal proceedings of the information communicated pursuant to this Article;

(c) govern responsibility for misuse of the right of information;

(d) afford an opportunity for refusing to provide information which would force the person referred to in paragraph 1 to admit to involvement in an infringement of an intellectual property right; or

\(^{22}\) NL, D, A : reservation on paragraph 2.
(e) govern the protection of confidentiality of information sources or the treatment of personal data.

4. Apart from the cases referred to in paragraph 1, Member States shall lay down that, when the responsible administrative authorities are in possession of the information referred to in paragraph 2, they may so inform the right holder, provided the latter is known, while complying with the rules on the protection of confidential information.²³

SECTION 4

PROVISIONAL AND PRECAUTIONARY²⁴ MEASURES

Article 10

Provisional measures

1. Member States shall lay down that the judicial authorities may, at the request of the applicant:

(a) serve the alleged infringer, or the intermediary whose services are being used by a third party to infringe a right,²⁵ with an interlocutory injunction intended to prevent any impending infringement of an intellectual property right, or to forbid,

²³ I : reservation on paragraph 4, on the grounds that it imposes obligations which are too burdensome for the administrative authorities.
²⁴ E : following the deletion of Article 11, delete also "AND PRECAUTIONARY" in the title of Section 4.
²⁵ NL, FIN, F, A, B, E : reservation on "or the intermediary whose services are being used by a third party to infringe a right".
on a provisional basis [and, if provided for by national law, subject to a recurring fine]\(^{26}\), the continuation of the alleged infringements of an intellectual property right, or to make such continuation subject to the lodging of guarantees intended to ensure the compensation of the right holder;

(b) authorise the seizure of the goods suspected of infringing an intellectual property right so as to prevent their introduction into or movement within channels of commerce.\(^{27}\)

The judicial authorities shall be empowered to require the applicant to provide any reasonably available evidence in order to satisfy themselves with a sufficient degree of certainty that the applicant is the right holder and that the applicant's right is being infringed, or that such infringement is imminent.

1a. In cases of infringement committed on a commercial scale,\(^{28}\) the Member States shall lay down that, if the injured party demonstrates circumstances likely to endanger the recovery of damages, the judicial authorities may authorise the precautionary seizure of the movable and immovable property of the alleged infringer, including the blocking of his bank accounts and other assets and\(^{29}\) to this end the communication or seizure of bank, financial or commercial documents.\(^{30} 31\)

2. Member States shall lay down that the provisional measures referred to in paragraphs 1 and 1a may, in appropriate cases, be taken without the defendant having been heard, in particular when any delay would cause irreparable prejudice to the right holder. In the event of this happening, the parties shall be so informed without delay after the execution of the measures at the latest.

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\(^{26}\) A, UK, IRL : reservation on the words in brackets.

\(^{27}\) D, NL, FIN, S : reservation on point (b).

\(^{28}\) F, FIN : reservation on "In cases of infringement committed on a commercial scale". NL requested that it be replaced by "In cases of infringements committed intentionally".

\(^{29}\) F, NL, S : insert "may order".

\(^{30}\) F : replace "or seizure of bank, financial or commercial documents" by "of the bank coordinates".

\(^{31}\) NL, FIN, L, D, B, P : reservation on paragraph 1a.
A review, including the right to be heard, shall take place at the request of the defendant in order to decide, within a reasonable time after notification of the measures, whether they are to be amended, revoked or confirmed.

3. Member States shall lay down that the provisional measures referred to in paragraphs 1 and 1a shall be revoked, at the defendant's request if the applicant does not institute proceedings leading to a decision on the merits of the case before the competent judicial authority within a reasonable period to be determined by the judicial authority which orders these measures where the Member State 's legislation so permits or, failing such determination, within a period not exceeding 20 working days or 31 calendar days if the latter period is longer.

4. The competent judicial authorities may\(^{32}\) make the injunction or the seizure subject to the lodging by the applicant of adequate security or equivalent assurance intended to ensure any compensation of the prejudice suffered by the defendant as provided for in paragraph 5.

5. Where the provisional measures have been revoked or where they lapse due to any act or omission by the applicant, or where it is subsequently found that there has been no infringement or threat of infringement of an intellectual property right, the judicial authorities must be empowered to order the applicant, at the request of the defendant, to provide the defendant with adequate compensation for any injury caused by these measures.

*Article 11*

**Precautionary measures**

Deleted (merged with Article 10).

\(^{32}\) **FIN**: replace "may" by "shall".
SECTION 5

MEASURES RESULTING FROM A DECISION ON THE MERITS OF THE CASE

Article 12

Corrective measures

Without prejudice to the damages due to the right holder by reason of the infringement, and without compensation of any kind, Member States shall lay down that the competent judicial authorities may order that the goods in respect of which they have established that they infringe an intellectual property right and, in appropriate cases, the materials and instruments principally used in the creation or manufacture of these goods, be:

(a) recalled from the channels of commerce,
(b) removed definitively from the channels of commerce or
(c) destroyed.

The judicial authorities shall order that these measures shall be carried out at the expense of the infringer, unless particular reasons are invoked for not doing so.

The corrective measures must be commensurate with the seriousness of the infringement and take account of the legitimate interests of third parties.

Article 13

Disposal outside the channels of commerce

Deleted (merged with Article 12).
Article 14

Destruction of goods

Deleted (merged with Article 12).

Article 15

Injunctions

1. Member States shall lay down that, when a judicial decision has been taken finding an infringement of an intellectual property right, the judicial authorities may\textsuperscript{33} serve the infringer and the intermediaries, whose services are used by third parties to infringe an intellectual property right,\textsuperscript{34} with an injunction aimed at prohibiting the continuation of the infringement. [If provided for by national law, non-compliance with an injunction shall be punishable by a fine accompanied, where applicable, by a recurring fine, with a view to ensuring compliance.]\textsuperscript{35}

2. Deleted (merged with paragraph 1)

Article 16

Alternative measures\textsuperscript{36}

Member States shall lay down that the competent judicial authorities may alternatively in appropriate cases and at the request of the person liable to be subjected to the measures provided for in this Section, order pecuniary compensation to be paid to the injured party instead of applying the

\textsuperscript{33} D : insert "at the request of the injured party".

\textsuperscript{34} FIN, NL, E, P, DK, UK : reservation on "and the intermediaries, whose services are used by third parties to infringe an intellectual property right".

\textsuperscript{35} A, UK, IRL : reservation on the sentence in brackets.

\textsuperscript{36} NL : general reservation on Article 16, on the grounds that it provides for the obligation to compensate even in case of unintentional infringement.
above measures if that person has acted unintentionally and without negligence, if execution of the measures in question would cause him disproportionate harm and if pecuniary compensation appears reasonably satisfactory to the injured party.\textsuperscript{37}

However, the commercial use […] of counterfeit goods and the supply of services shall remain prohibited where they constitute an infringement of the law or are likely to harm consumers.\textsuperscript{38}

[SECTION 6)

DAMAGES AND LEGAL COSTS]

Article 17

Damages

1. Member States shall lay down that the competent judicial authorities, on application by the injured party, shall order the infringer who knowingly, or with reasonable grounds to know, engaged in an infringing activity, to pay the right holder [adequate] damages corresponding to the actual prejudice suffered by him as a result of the infringement.

The damages shall be set by the judicial authorities:

(a) either by taking into account all appropriate aspects, such as the negative economic consequences, including lost profits, which the injured party has suffered, as well as any unfair profits made by the infringer;

\textsuperscript{37} F : need to make the application of this Article subject to the agreement of the injured party.

\textsuperscript{38} F, D : reservation on the second paragraph of Article 16.
(b) or, in appropriate cases, on the basis of a lump sum [, which shall be of a non-punitive nature,] set at up to double the royalties or fees which would have been due if the infringer had requested authorisation to use the intellectual property right in question.

In appropriate cases, Member States shall lay down that the prejudice suffered can also be deemed to include elements other than economic factors, such as the moral prejudice caused to the right holder by the infringement.

[...]  

2. Deleted.

3. Member States may lay down that the judicial authorities may order the recovery of profits and/or the payment of damages even where the infringer did not knowingly, or with reasonable grounds to know, engage in infringing activity.

Article 18

Legal costs\textsuperscript{39}

Member States shall lay down that the legal costs, lawyer's fees\textsuperscript{40} and any other expenses incurred by the successful party shall be borne by the other party, unless equity does not allow this. The competent authorities shall determine the sum to be paid.

\textsuperscript{39} A, D, DK, E, FIN, NL, UK, L, IRL, I, HU, B, S : general reservation on Article 18.  
\textsuperscript{40} HU : replace "lawyer's fees" by "professional representatives' fees".
SECTION 7

PUBLICITY MEASURES

Article 19

Publication of judicial decisions

Member States shall lay down that, in legal proceedings instituted for infringement of an intellectual property right, the judicial authorities may order, at the expense of the infringer, appropriate measures for the dissemination of the information concerning the decision, including displaying the decision and publishing it in full or in part in the media.

41  **DK, FIN, S** : general reservation on the mandatory nature of Article 19. **FIN** has suggested the following alternative wording:

"1. Member States shall ensure that the judicial decisions concerning the infringement of an intellectual property right shall be made available to the public to appropriate extent.

2. Member States may, in order to carry out the obligation under paragraph 1, lay down that, in legal proceedings instituted for infringement of an intellectual property right, the judicial authorities may order, at the expense of the losing party, appropriate measures for the dissemination of the information concerning the decision, including displaying the decision and publishing it in full or in part in the media."

42  **F** : insert "and up to a maximum amount to be fixed by the court".

43  **D** : provide that such dissemination will have to take place within 6 months from the judgement.
CHAPTER III

CRIMINAL LAW PROVISIONS

Article 20

Criminal law provisions\textsuperscript{44}

1. Without prejudice to the civil and/or administrative measures provided for under this Directive, Member States shall adopt the necessary measures to ensure that at least every infringement of an intellectual property right of a serious and intentional nature is liable to penal sanctions.

2. Deleted.

CHAPTER IV

TECHNICAL MEASURES

Article 21

Legal protection of technical devices\textsuperscript{45}

1. Without prejudice to particular provisions applicable in the field of copyright, related rights and the \textit{sui generis} right of the creator of a database, Member States shall provide for appropriate legal protection against the manufacture, import, distribution and use of illegal technical devices.

\textsuperscript{44} A very large majority of delegations has entered a reservation on Article 20.

\textsuperscript{45} D, FIN, B, S, A, NL, DK, UK: general reservation on the appropriateness of applying Article 21 in the field of industrial property.
2. For the purposes of this Chapter,

(a) "technical device" means any technology, device or component which, in the normal course of its functioning, is designed for the incorporation in tangible products protected by an industrial property right of elements which are manifestly identifiable by customers and consumers and which make it easier to recognise the goods as being authentic;

(b) "illegal technical device" means any technology, device or component which is designed to incorporate in tangible products elements designed to deceive or mislead any person as to the authenticity of the products in question.

Article 22

Codes of conduct

1. Member States shall encourage:

(a) the development by trade or professional associations or organisations of codes of conduct at Community level aimed at contributing towards the enforcement of the intellectual property rights referred to in Article 2, particularly by recommending the use on optical discs of a source code enabling the identification of the origin of their manufacture;

(b) the submission to the Commission of draft codes of conduct at national and Community level and of any evaluations of the application of these codes of conduct.
CHAPTER V

ADMINISTRATIVE COOPERATION

Article 23
Assessment

1. Three years after the date laid down in Article 25(1), each Member State shall submit to the Commission a report informing it of the situation with regard to implementation of this Directive.

On the basis of those reports, the Commission shall draw up a report on the application of this Directive, including an assessment of the effectiveness of the measures taken, as well as an evaluation of its impact on innovation and the development of the information society. That report shall be transmitted to the European Parliament, the Council and the European Economic and Social Committee. It shall be accompanied, if necessary, by proposals for amendments to this Directive.

2. Member States shall provide the Commission with all the aid and assistance it may need when drawing up the report referred to in the second subparagraph of paragraph 1.

Article 24
Exchange of information and correspondents

1. Member States shall ensure that flexible and appropriate procedures for cooperation are established between them, in particular the exchange of information, using telematic means, between, on the one hand, the administrative authorities responsible for the
protection of intellectual property and, on the other hand, those which hold information on the origin and networks for the distribution of goods or the supply of services or other information relating to the infringement of intellectual property rights.

2. For this purpose, each Member shall designate one or more national correspondents who shall coordinate cooperation with the other Member States and with the Commission to ensure as rapidly as possible that the information referred to in paragraph 1 is provided and that cooperation is effective. The details of the correspondents shall be communicated to the other Member States and to the Commission.

CHAPTER VI

FINAL PROVISIONS

Article 25

Implementation

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by … [eighteen months after the date of adoption of this Directive] at the latest. They shall forthwith inform the Commission thereof.

When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

46 E : reservation on "the protection of".
47 F : insert :"and in accordance with national law and with the provisions of Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data".
48 B, F, UK, P, NL : need for longer implementation period.
2. Member States shall communicate to the Commission the text of the provisions of national law which they adopt in the field covered by this Directive.

Article 26

Entry into force

This Directive shall enter into force on the twentieth day following its publication in the Official Journal of the European Union.

Article 27

Addresses

This Directive is addressed to the Member States.
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
- Drafting proposal on Articles 7 and 9

Delegations will find in Annex a drafting proposal submitted by the Italian delegation on Articles 7 and 9 of the proposed Directive.

The amendments in relation to 16289/03 are indicated.
ANNEX

Article 7

Evidence

1. Member States shall lay down that, on application by a party which has presented reasonably accessible evidence sufficient to support its claims, and has, in substantiating those claims, cited evidence which is to be found under the control of the opposing party, the competent judicial authorities may order that such evidence be produced by the opposing party, subject to the protection of confidential information.

2. Deleted (see Art. 9(1)(A) below)

Article 9

Right of information

1. Member States shall lay down that, in the context of proceedings concerning an alleged infringement of an intellectual property right, or in order to comply with a request for provisional or precautionary measures, the competent judicial authorities, at the request of the right holder or of other persons or bodies referred to in Article 5, in appropriate cases and unless particular reasons are invoked for not doing so, may order:

A) the communication of banking, financial or commercial documents under the control of the defendant, subject to the protection of confidential information in order to identify those directly involved in the infringement carried out on a commercial scale:
B) any person to provide information on persons involved in the production, manufacture or distribution of the goods or the provision of the services, on the origin of the goods or services which are alleged to infringe an intellectual property right and on the networks for their distribution or provision, respectively, if that person:

(a) was found in possession, for commercial purposes, of the infringing goods;

(b) was found to be using the infringing services for commercial purposes;

(ba) was found to be providing for commercial purposes services used in infringing activities. [...]

(c) Deleted.

2. Deleted.

First variant

3. Paragraph 1 shall apply without prejudice to other statutory provisions which limit or extend the right holder's rights to receive fuller information.

Second variant

3. Paragraph 1 [...] shall apply without prejudice to other statutory provisions which:

(a) grant the right holder rights to receive fuller information;

(b) govern the use in civil or criminal proceedings of the information communicated pursuant to this Article;
(c) govern responsibility for misuse of the right of information;

(d) afford an opportunity for refusing to provide information which would force the person referred to in paragraph 1 to admit to involvement in an infringement of an intellectual property right; [...] 

(e) govern the protection of confidentiality of information sources or the treatment of personal data.

4. Apart from the cases referred to in paragraph 1, Member States shall lay down that, when the responsible administrative authorities are in possession of the information referred to in paragraph 2, they may so inform the right holder, provided the latter is known, while complying with the rules on the protection of confidential information.
COUNCIL OF THE EUROPEAN UNION

Interinstitutional File: 2003/0024 (COD)

Brussels, 26 January 2004

5657/04

LIMITE

PI 8
CODEC 105

WORKING DOCUMENT

From: United Kingdom delegation

to: Working Party on Intellectual Property

No. prev. doc.: 5475/04 PI 6 CODEC 76
No. Cion prop.: 6777/03 PI 19 CULT 17 CODEC 204

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 - Suggestions for drafting amendments to 16289/03

Article 3

General obligation

1. This Directive applies to administrative and civil procedures only. Member States shall provide for the proportionate measures, procedures and remedies needed to ensure the enforcement of the intellectual property rights covered by this Directive.

2. The measures and remedies shall also be effective, proportionate and dissuasive and shall be applied in such a manner as to avoid the creation of barriers to legitimate trade.
Justification

The new first sentence has been suggested by the Legal Affairs Committee of the EP (LAC) and is helpful in clarifying the scope of this Directive. Here and elsewhere “sanctions” has been replaced by “remedies” as sanctions suggest criminal matters.

Article 8
Measures for protecting evidence

1. Member States shall ensure that even before the commencement of proceedings on the merits of the case the competent judicial authorities may, on application by a party who alleges that his intellectual property right has been infringed or is about to be infringed and that it is necessary to preserve relevant evidence, authorise in any place either the detailed description, with or without the taking of samples, or the physical seizure or delivery up of relevant evidence in regard to the alleged infringement subject to the protection of confidential information. These measures shall be taken by order issued on application, if necessary without the other party having been heard, in particular where there is a demonstrable risk that evidence may be destroyed.

Where evidence-protection measures have been adopted without the other party having been heard, the affected parties shall be given notice immediately after the execution of the measures at the latest. A review, including a right to be heard, shall take place upon request of the affected parties with a view to deciding, within a reasonable period after the Notification of the measures, whether the measures shall be modified, revoked or confirmed.

2. Member States shall ensure that evidence protection measures may be subject to the applicant’s lodging of an adequate security or equivalent assurance intended to ensure compensation for any prejudice suffered by the defendant or a third party as provided for in paragraph 4.
3. Member States shall ensure that the evidence protection measures shall be revoked […] without prejudice to the damages which may be claimed, if the applicant has not instituted legal proceedings leading to a decision on the merits of the case before the competent judicial authority within a reasonable interval, which shall be specified by the judicial authority ordering the measures when the law of a Member State permits or, in the absence of such specification, within an interval not exceeding 20 working days or 31 calendar days if longer.

4. Where the evidence protection measures have been revoked, or where they lapse owing to any act or omission by the applicant, or where it is subsequently found that there has been no infringement or threat of infringement of any intellectual property right, the judicial authorities shall be empowered to order the applicant, at the defendant’s request, to provide the defendant with adequate compensation for any loss caused by the measures. The judicial authorities shall also be empowered, at the request of a non-infringing third party, to order compensation to that third party for any loss incurred as a result of the measures.

Justification

This article is about the protection of evidence so it is important that para 1 only permits an order relating to evidence relevant to the alleged infringement. This may include infringing goods, documents relating to their production and so on, but these items are not always relevant evidence. Also, para 1 should permit the possibility of delivery up to the applicant as an alternative to actual seizure. This last change is also relevant to Article 10 where seizure should not be the only option.

Paras 2 and 3 need to apply to evidence protection measures of any type and not just those permitting seizure. Para 3 should be broad enough to cover revocation of the measures even where the defendant has not so requested. This also applies to the equivalent provision in Article 10.

Paras 2 and 4 should be broad enough to permit compensation to a third party affected by these measures and the term “injury” may be too narrow regarding the effect on either the defendant or the third party which is deserving of compensation. This also applies to the equivalent provision in Article 10.
Article 10

Provisional measures

1. 1. Member States shall ensure that the judicial authorities may, at the request of the applicant:

(a) issue against the alleged infringer […] an interlocutory injunction intended to prevent any impending infringement of an intellectual property right, or to forbid, on a provisional basis [and, if provided for by national law, subject to a recurring fine], the continuation of the alleged infringements of an intellectual property right, or to make such continuation subject to the lodging of guarantees intended to ensure the compensation of the right holder (b) authorise the seizure or delivery up of the goods suspected of infringing an intellectual property right so as to prevent their introduction into or movement within channels of commerce.

The judicial authorities shall be empowered to require the applicant to provide any reasonably available evidence in order to satisfy themselves with a sufficient degree of certainty that the applicant is the right holder and that the applicant's right is being infringed, or that such infringement is imminent.

1a. In cases of infringement committed on a commercial scale, the Member States shall ensure that, if the injured party demonstrates circumstances likely to endanger the recovery of damages, the judicial authorities may authorise the precautionary seizure or blocking of the movable and immovable property of the alleged infringer, including the blocking of his bank accounts and other assets […]

2. Member States shall ensure that the provisional measures referred to in paragraphs 1 and 1a may, in appropriate cases, be taken without the defendant having been heard, in particular when any delay would cause irreparable prejudice to the right holder or when giving notice may give rise to a significant risk that potentially infringing material or relevant evidence might be destroyed, hidden or otherwise disposed of. In the event of this happening, the parties shall be so informed without delay after the execution of the measures at the latest.
A review, including the right to be heard, shall take place at the request of the defendant in order to decide, within a reasonable time after notification of the measures, whether they are to be amended, revoked or confirmed.

3. Member States shall ensure that the provisional measures referred to in paragraphs 1 and 1a shall be revoked […] if the applicant does not institute proceedings leading to a decision on the merits of the case before the competent judicial authority within a reasonable period to be determined by the judicial authority which orders these measures where the Member State 's legislation so permits or, failing such determination, within a period not exceeding 20 working days or 31 calendar days if the latter period is longer.

4. The competent judicial authorities may make the injunction or the seizure or blocking subject to the lodging by the applicant of adequate security or equivalent assurance intended to ensure any compensation of the prejudice suffered by the defendant as provided for in paragraph 5.

5. Where the provisional measures have been revoked or where they lapse due to any act or omission by the applicant, or where it is subsequently found that there has been no infringement or threat of infringement of an intellectual property right, the judicial authorities must be empowered to order the applicant, at the request of the defendant, to provide the defendant with adequate compensation for any loss caused by these measures. The judicial authorities shall also be empowered, at the request of a non-infringing third party, to order compensation to that third party for any loss incurred as a result of the measures.

Justification

It is inappropriate for this Article to apply to “intermediaries”. The scope of this term is potentially very wide and so the effect of this measure is not clear. More specific provision should be provided when this is shown to be necessary, such as that in Article 8.3 of Directive 2001/29/EC, when it is possible to assess the affect and thus the fairness or otherwise of such a provision. This applies to Article 15 too where the references to intermediaries have also been deleted.
Para 1 needs to provide the flexibility for Member States to determine for themselves how an interlocutory injunction is served so the para should just refer to the judicial authorities being able to issue an injunction. This applies to Article 15 too.

The communication of bank etc documents is already covered by Article 7().

Para 2 should also permit the provisional orders to be applied for without the defendant having been heard when there is a risk that to do otherwise might lead to destruction etc of the evidence etc.

Article 15

Injunctions

1. Member States shall ensure that, when a judicial decision has been taken finding an infringement of an intellectual property right, the judicial authorities may issue an injunction against the infringer [...] aimed at prohibiting the continuation of the infringement. [If provided for by national law, non-compliance with an injunction shall be punishable by a fine accompanied, where applicable, by a recurring fine, with a view to ensuring compliance.]

2. Deleted (merged with paragraph 1)

Justification

As for 10.
Article 17

Damages

1. Member States shall ensure that the competent judicial authorities, on application by the injured party, are able to order the infringer who knowingly, or with reasonable grounds to know, engaged in an infringing activity, to pay the right holder [appropriate] damages in reparation of the damage incurred by him as a result of the infringement.

The damages, which shall be of a non – punitive nature, may take into account all appropriate aspects, such as the foreseeable negative economic consequences which the injured party has suffered, including lost profits and any royalties or fees which would have been due if the infringer had requested authorisation to use the intellectual property right in question, or any unfair profits made by the infringer, and may include elements other than economic factors.

2. Deleted.

3. Member States may lay down that the judicial authorities may order the recovery of profits and/or the payment of damages even where the infringer did not knowingly, or with reasonable grounds to know, engage in infringing activity.

Justification

The level of damages must be determined by the judicial authorities of Member States. The judicial authorities must retain discretion to take into account all the circumstances of the individual case in assessing damages.
Article 18
Legal costs

Deletion or the following:

“Member States shall ensure that reasonable and proportionate legal costs and other expenses incurred by the successful party in the legal action shall as general rule be paid by the unsuccessful party but that the court can make any other order.”

Article 20
Criminal law provisions

Deletion

Article 24
Exchange of information and correspondents

Deletion

Justification

Provisions in this Article are relevant to enforcement under the criminal law and so not appropriate for this Directive. Administrative authorities do not keep records of this information where the infringement has been subject to a civil action only.
Article 25
Implementation

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by … [twenty four months after the date of adoption of this Directive] at the latest. They shall forthwith inform the Commission thereof.

When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the text of the provisions of national law which they adopt in the field covered by this Directive.

Justification

An easier life for all concerned
COUNCIL OF THE EUROPEAN UNION

Interinstitutional File: 2003/0024 (COD)

Brussels, 29 January 2004

5802/04

LIMITE

PI 10
CODEC 126

WORKING DOCUMENT

from: Presidency
to: Working Party on Intellectual Property

No. prev. doc.: 5657/04 PI 8 CODEC 105
No. Cion prop.: 6777/03 PI 19 CULT 17 CODEC 204

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 - Consolidated text


Changes in relation to 16289/03 are indicated.

A consolidated text of the recitals will be circulated separately.
ANNEX

CHAPTER I

OBJECTIVE AND SCOPE

Article 1

Subject-matter

This Directive concerns the measures and procedures necessary to ensure the enforcement of intellectual property rights. For the purposes of this Directive, the term "intellectual property rights" includes industrial property rights.

Article 2

Scope

1. Without prejudice to the means which are or may be provided for in Community or national legislation, in so far as those means may be more favourable for right holders, the measures and procedures provided for by this Directive shall apply, in accordance with Article 3, to any infringement of [...] intellectual property rights [...] as provided for by Community law and/or by the national law of the Member State concerned. [...] 

2. This Directive shall be without prejudice to the particular provisions on the enforcement of rights and on exceptions contained in Community legislation concerning copyright and rights related to copyright, notably those found in Directive 91/250/EEC or Directive 2001/29/EC and, in particular, Articles 2 to 5 and Article 8 of that Directive.
3. This Directive shall not affect:

(a) the Community provisions governing the substantive law on intellectual property, Directive 95/46/EC, Directive 1999/93/EC or Directive 2000/31/EC in general, and the provisions of Articles 12 to 15 in particular of that Directive;

(b) Member States’ international obligations and notably the Agreement on Trade-Related Aspects of Intellectual Property Rights (the “TRIPS Agreement”), including those relating to criminal procedures and penalties;

(c) any national provisions in Member States relating to criminal procedures or penalties in respect of infringement of intellectual property rights.

CHAPTER II
MEASURES AND PROCEDURES

SECTION 1
GENERAL PROVISIONS

Article 3
General obligation

Member States shall provide for the measures, procedures and remedies needed to ensure the enforcement of the intellectual property rights covered by this Directive. These measures, procedures and remedies shall be fair and equitable, and shall not be unnecessarily complicated or costly, nor entail unreasonable time-limits or unwarranted delays.
The measures and remedies shall also be effective, proportionate and dissuasive and shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.

Member States shall ensure that the measures and remedies shall be determined in each case in such a manner as to take due account of the specific characteristics of that case, including the specific features of each intellectual property right and, where appropriate, the intentional or unintentional character of the infringement.

Article 4
Penalties

Merged with Article 3.

Article 5

Persons entitled to apply for the application of the measures and procedures

1. Member States shall recognise as persons entitled to seek application of the measures and procedures referred to in this Chapter:

- the holders of intellectual property rights,

- [...] all other persons authorised to use those rights [...] in particular licensees, [...] in so far as permitted by and in accordance with the provisions of the applicable law,

- intellectual property collective rights management bodies which are regularly recognised as having a right to represent holders of intellectual property rights, in accordance with the applicable law,

- professional defence bodies which are regularly recognised as having a right to represent holders of intellectual property rights, in accordance with the applicable law.
Article 6
Presumption of authorship

For the purposes of applying the measures and procedures provided for in this Directive, until proved otherwise, authorship of a work or ownership of a right related to copyright shall be presumed to be vested in the person whose name […] is featured on the work or object, or whose authorship or ownership is referred to on the work or object […]

SECTION 2
EVIDENCE

Article 7
Evidence

1. Member States shall ensure that, on application by a party which has presented reasonably available evidence sufficient to support its claims, and has, in substantiating those claims, specified evidence which lies in the control of the opposing party, the competent judicial authorities may order that such evidence be produced by the opposing party, subject to the protection of confidential information. For the purposes of this paragraph, Member States may provide that a reasonable sample of a substantial number of copies of a work or any other protected object shall be presumed to constitute reasonable evidence.

2. Under the same conditions, in the case of an infringement carried out on a commercial scale, Member States shall take such measures as are necessary to enable the competent judicial authorities to order, at the request of the plaintiff, the communication of banking, financial or commercial documents under the control of the defendant, subject to the protection of confidential information.
Article 8

Measures for protecting evidence

1. Member States shall ensure that even before the commencement of proceedings on the merits of the case the competent judicial authorities may, on application by a party who has presented reasonably available evidence to support his claims that his intellectual property right has been infringed or is about to be infringed, order prompt and effective provisional measures to preserve relevant evidence in regard to the alleged infringement, subject to the protection of confidential information. Such measures may include the detailed description, with or without the taking of samples, or the physical seizure of the infringing goods, and, in appropriate cases, the materials and implements used in the production and/or distribution of these goods and the documents relating thereto. These measures shall be taken [...], if necessary without the other party having been heard, in particular where there is a demonstrable risk that evidence may be destroyed.

Where evidence-protection measures have been adopted without the other party having been heard, the affected parties shall be given notice immediately after the execution of the measures at the latest. A review, including a right to be heard, shall take place upon request of the affected parties with a view to deciding, within a reasonable period after the notification of the measures, whether the measures shall be modified, revoked or confirmed.

2. Member States shall ensure that the evidence-protection measures may be subject to the applicant’s lodging of an adequate security or equivalent assurance intended to ensure compensation for any prejudice suffered by the defendant as provided for in paragraph 4.
3. Member States shall ensure that the evidence-protection measures shall be revoked or otherwise cease to have effect upon request by the defendant, without prejudice to the damages which may be claimed, if the applicant has not instituted legal proceedings leading to a decision on the merits of the case before the competent judicial authority within a reasonable period, to be determined by the judicial authority ordering the measures when the law of a Member State so permits or, in the absence of such determination, within a period not to exceed 20 working days or 31 calendar days, whichever is the longer.

4. Where the evidence-protection measures have been revoked, or where they lapse due to any act or omission by the applicant, or where it is subsequently found that there has been no infringement or threat of infringement of any intellectual property right, the judicial authorities shall have the authority to order the applicant, upon request of the defendant, to provide the defendant with appropriate compensation for any injury caused by these measures.

5. Member States may take measures to protect witnesses' identity.
SECTION 3

RIGHT OF INFORMATION

Article 9

Right of information

1. Member States shall ensure that, in the context of proceedings concerning an alleged infringement of an intellectual property right, or in order to comply with a request for provisional or precautionary measures, the competent judicial authorities may order, in response to a justified and proportionate request of the right holder or of other persons or bodies referred to in Article 5, in appropriate cases [...], any person to provide information on the origin of the goods or services which are alleged to infringe an intellectual property right and on the networks for their distribution or provision, respectively, if that person:

(a) was found in possession of the infringing goods on a commercial scale;

(b) was found to be using the infringing services on a commercial scale;

(ba) was found to be providing on a commercial scale services used in infringing activities; or

(c) was indicated by the person referred to in point (a), (b) or (ba) as being involved in the production, manufacture or distribution of the goods or the provision of the services.
2. The information referred to in paragraph 1 shall comprise:

(a) the names and addresses of the producers, manufacturers, distributors, suppliers and other previous holders of the goods or services, as well as the intended wholesalers and retailers;

(b) information on the quantities produced, manufactured, delivered, received or ordered, as well as the price obtained for the goods or services in question.

3. Paragraphs 1 and 2 shall apply without prejudice to other statutory provisions which:

(a) grant the right holder rights to receive fuller information;

(b) govern the use in civil or criminal proceedings of the information communicated pursuant to this Article;

(c) govern responsibility for misuse of the right of information;

(d) afford an opportunity for refusing to provide information which would force the person referred to in paragraph 1 to admit to his own participation or that of his close relatives in an infringement of an intellectual property right; or

(e) govern the protection of confidentiality of information sources or the treatment of personal data.

4. Apart from the cases referred to in paragraph 1, Member States shall ensure that, when the responsible administrative authorities are in possession of the information referred to in paragraph 2, they may so inform the right holder, provided the latter is known, while complying with the rules on the protection of confidential information.
SECTION 4

PROVISIONAL AND PRECAUTIONARY MEASURES

Article 10

Provisional measures

1. Member States shall ensure that the judicial authorities may, at the request of the applicant:

(a) issue against the alleged infringer, or the intermediary whose services are being used by a third party to infringe a right, […] an interlocutory injunction intended to prevent any impending infringement of an intellectual property right, or to forbid, on a provisional basis [and, if provided for by national law, subject to a recurring penalty payment], the continuation of the alleged infringements of an intellectual property right, or to make such continuation subject to the lodging of guarantees intended to ensure the compensation of the right holder;

(b) order the seizure or delivery up of the goods suspected of infringing an intellectual property right so as to prevent their entry into or movement within the channels of commerce.

The judicial authorities shall have the authority to require the applicant to provide any reasonably available evidence in order to satisfy themselves with a sufficient degree of certainty that the applicant is the right holder and that the applicant's right is being infringed, or that such infringement is imminent.

1a. In cases of infringement committed on a commercial scale, the Member States shall ensure that, if the injured party demonstrates circumstances likely to endanger the recovery of damages, the judicial authorities may order the precautionary seizure of the movable and immovable property of the alleged infringer, including the blocking of his bank accounts and other assets. […] To this end, the competent authorities may order the communication […] of bank, financial or commercial documents, or appropriate access to the relevant information.
2. Member States shall ensure that the provisional measures referred to in paragraphs 1 and 1a may, in appropriate cases, be taken without the defendant having been heard, in particular when any delay would cause irreparable prejudice to the right holder. In the event of this happening, the parties shall be so informed without delay after the execution of the measures at the latest.

A review, including the right to be heard, shall take place upon request of the defendant with a view to deciding, within a reasonable time after notification of the measures, whether these measures shall be modified, revoked or confirmed.

3. Member States shall ensure that the provisional measures referred to in paragraphs 1 and 1a shall be revoked, or otherwise cease to have effect, upon request by the defendant, if the applicant does not institute proceedings leading to a decision on the merits of the case before the competent judicial authority within a reasonable period to be determined by the judicial authority ordering the measures where the Member State's law so permits or, in the absence of such determination, within a period not to exceed 20 working days or 31 calendar days, whichever is the longer.

4. The competent judicial authorities may make the provisional measures referred to in paragraphs 1 and 1a subject to the lodging by the applicant of adequate security or equivalent assurance intended to ensure any compensation of the prejudice suffered by the defendant as provided for in paragraph 5.

5. Where the provisional measures are revoked or where they lapse due to any act or omission by the applicant, or where it is subsequently found that there has been no infringement or threat of infringement of an intellectual property right, the judicial authorities shall have the authority to order the applicant, upon request of the defendant, to provide the defendant with appropriate compensation for any injury caused by these measures.
Article 11
Precautionary measures
Deleted (merged with Article 10).

SECTION 5
MEASURES RESULTING FROM A DECISION ON THE MERITS
OF THE CASE

Article 12
Corrective measures

Without prejudice to any damages due to the right holder by reason of the infringement, and without compensation of any sort, Member States shall ensure that the competent judicial authorities may order, at the request of the applicant, that the goods that they have found to be infringing an intellectual property right and, in appropriate cases, the materials and implements principally used in the creation or manufacture of these goods, be:

(a) recalled from the channels of commerce,
(b) removed definitively from the channels of commerce or
(c) destroyed.

The judicial authorities shall order that these measures shall be carried out at the expense of the infringer, unless particular reasons are invoked for not doing so.

In considering a request for corrective measures, the need for proportionality between the seriousness of the infringement and the remedies ordered as well as the […] interests of third parties shall be taken into account.
**Article 13**

**Disposal outside the channels of commerce**

Deleted (merged with Article 12).

**Article 14**

**Destruction of goods**

Deleted (merged with Article 12).

**Article 15**

**Injunctions**

1. Member States shall *ensure* that, when a judicial decision has been taken finding an infringement of an intellectual property right, the judicial authorities may *issue against* the infringer and the intermediaries, whose services are used by third parties to infringe an intellectual property right, an injunction aimed at prohibiting the continuation of the infringement. [If provided for by national law, non-compliance with an injunction shall be *subject to [...] a recurring penalty payment*, with a view to ensuring compliance.]

2. Deleted (merged with paragraph 1)

**Article 16**

**Alternative measures**

Member States shall *ensure* that the competent judicial authorities may alternatively in appropriate cases and at the request of the person liable to be subjected to the measures provided for in this Section, order pecuniary compensation to be paid to the injured party instead of applying the
above measures if that person has acted unintentionally and without negligence, if execution of the
measures in question would cause him disproportionate harm and if pecuniary compensation
appears reasonably satisfactory to the injured party.

[However, the commercial use of counterfeit goods and the supply of services shall remain
prohibited where they constitute an infringement of law other than intellectual property law or are
likely to harm consumers.]

[SECTION 6

DAMAGES AND LEGAL COSTS]

Article 17

Damages

1. Member States shall ensure that the competent judicial authorities, on application by the
injured party, shall order the infringer who knowingly, or with reasonable grounds to
know, engaged in an infringing activity, to pay the right holder […] damages appropriate
to the actual prejudice suffered by him as a result of the infringement.

The damages shall be set by the judicial authorities :

(a) either by taking into account all appropriate aspects, such as the negative economic
consequences, including lost profits, which the injured party has suffered, as well as
any unfair profits made by the infringer. In appropriate cases, the prejudice suffered
can also be deemed to include elements other than economic factors, such as the
moral prejudice caused to the right holder by the infringement;
(b) or, in appropriate cases, on the basis of a lump sum […] set at up to double the royalties or fees which would have been due if the infringer had requested authorisation to use the intellectual property right in question.

[...]

2. Deleted.

3. Member States may lay down that the judicial authorities may order the recovery of profits and/or the payment of [pre-established] damages even where the infringer did not knowingly, or with reasonable grounds to know, engage in infringing activity.

Article 18
Legal costs

Member States shall lay down that the legal costs, [and where appropriate] lawyer's fees and any other expenses incurred by the successful party shall be borne by the other party, unless equity does not allow this. The competent authorities shall determine the sum to be paid.
SECTION 7

PUBLICITY MEASURES

Article 19

Publication of judicial decisions

Member States shall ensure that, in legal proceedings instituted for infringement of an intellectual property right, the judicial authorities may order, at the request of the applicant and at the expense of the infringer, appropriate measures for the dissemination of the information concerning the decision, including displaying the decision and publishing it in full or in part in the media.

[Member States may provide for other additional publicity measures which are appropriate to the particular circumstances, including prominent advertising.]

CHAPTER III

OTHER SANCTIONS

Article 20

Other sanctions

1. Without prejudice to the civil and […] administrative measures and procedures laid down by this Directive, Member States may apply other appropriate sanctions in cases where intellectual property rights have been infringed.

2. to 4. Deleted.
CHAPTER IV
TECHNICAL MEASURES

Article 21
Legal protection of technical devices

1. Without prejudice to particular provisions applicable in the field of copyright, related rights and the sui generis right of the creator of a database, Member States shall provide for appropriate legal protection against the manufacture, import, distribution and use of illegal technical devices.

2. For the purposes of this Chapter,

(a) "technical device" means any technology, device or component which, in the normal course of its functioning, is designed for the incorporation in tangible products protected by an industrial property right of elements which are manifestly identifiable by customers and consumers and which make it easier to recognise the goods as being authentic;

(b) "illegal technical device" means any technology, device or component which is designed to incorporate in tangible products elements designed to deceive or mislead any person as to the authenticity of the products in question.
Article 22

Codes of conduct

1. Member States shall encourage:

(a) the development by trade or professional associations or organisations of codes of conduct at Community level aimed at contributing towards the enforcement of the intellectual property rights referred to in Article 2, particularly by recommending the use on optical discs of a source code enabling the identification of the origin of their manufacture;

(b) the submission to the Commission of draft codes of conduct at national and Community level and of any evaluations of the application of these codes of conduct.

2. Deleted

p.m. The Legal Affairs Committee of the European Parliament has proposed an additonal Article 22a.
CHAPTER V

ADMINISTRATIVE COOPERATION

Article 23

Assessment

1. Three years after the date laid down in Article 25(1), each Member State shall submit to the Commission a report informing it of the situation with regard to implementation of this Directive.

On the basis of those reports, the Commission shall draw up a report on the application of this Directive, including an assessment of the effectiveness of the measures taken, the number of court cases heard, as well as an evaluation of its impact on innovation and the development of the information society. That report shall be transmitted to the European Parliament, the Council and the European Economic and Social Committee. It shall be accompanied, if necessary, by proposals for amendments to this Directive.

2. Member States shall provide the Commission with all the aid and assistance it may need when drawing up the report referred to in the second subparagraph of paragraph 1.

Article 24

Exchange of information and correspondents

1. Member States shall ensure that flexible and appropriate procedures for cooperation are established between them, in particular the exchange of information, using telematic means, between, on the one hand, the administrative authorities responsible for the protection of intellectual property and, on the other hand, those which hold information on the origin and networks for the distribution of goods or the supply of services or other information relating to the infringement of intellectual property rights.
2. For this purpose, each Member shall designate one or more national correspondents who shall coordinate cooperation with the other Member States and with the Commission to ensure as rapidly as possible that the information referred to in paragraph 1 is provided and that cooperation is effective. The details of the correspondents shall be communicated to the other Member States and to the Commission.

CHAPTER VI

FINAL PROVISIONS

Article 25
Implementation

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by … [eighteen months after the date of adoption of this Directive] at the latest. They shall forthwith inform the Commission thereof.

When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the text of the provisions of national law which they adopt in the field covered by this Directive.
Article 26

Entry into force

This Directive shall enter into force on the twentieth day following its publication in the *Official Journal of the European Union*.

Article 27

Addresses

This Directive is addressed to the Member States.
ADDENDUM to WORKING DOCUMENT

from: United Kingdom delegation
to: Working Party on Intellectual Property

No. prev. doc.: 5832/04 PI 11 CODEC 129
No. Cion prop.: 6777/03 PI 19 CULT 17 CODEC 204

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

- Further suggestions for drafting amendments to 16289/03

Delegations will find attached further drafting suggestions, in addition to those made in 5657/04.
Article 5

Persons entitled to apply for the application of the measures and procedures

Member States shall recognise as persons entitled to seek application of the measures and procedures referred to in this Chapter, in accordance with and as permitted by the applicable law:

- holders of intellectual property rights;
- licensees of the holders of intellectual property rights as determined by the applicable law;
- rights management bodies, federations and associations who have the legal standing to assert such rights under the applicable law.

Justification

This suggestion essentially follows the helpful framework set out in the drafting suggestion made by France. However, the reference to “all other persons authorised by the right holders to use those rights” is too broad; this could lead to action being possible by a very wide spectrum of people who have no direct interest in the intellectual property right which is inappropriate. It is also important in all cases that Member States are able to make provision limiting and applying conditions on those who can seek application of the measures, to avoid, for example, a very large number of people or bodies taking action against the same infringement at different times.

Article 12

Corrective Measures

Without compensation of any kind, Member States shall ensure that the competent judicial authorities may order that the goods in respect of which they have established that they infringe an intellectual property right and, in appropriate cases, the materials and instruments principally used in the creation or manufacture of these goods, be:
[...]  
(a) removed definitively from the channels of commerce or  
(b) destroyed [...].

The judicial authorities may order that the infringer must take such measures as are within his power to recall the infringing goods from the channels of commerce. These measures shall be carried out at the expense of the infringer, unless the judicial authorities order otherwise.

The corrective measures must be commensurate with the seriousness of the infringement and take account of the legitimate interests of third parties.

Justification

When awarding corrective measures, it must be possible to assess what other remedies are being awarded, such as damages, to ensure that the overall burden on the defendant is not punitive (hence the deletion of the first line).

For clarification there needs to be a clear reference to the judicial authorities ordering measures about recall of infringing goods against the infringer. It would not be appropriate for an order to be made against third parties directly or for recall to be required to be carried out by a public authority.

Article 21

Legal protection of technical devices

Deletion - despite extensive discussion we still do not understand how this provision will operate and so cannot assess what its impact might be. It is particularly important that any provision here does not conflict with the existing provisions in the Copyright Directive.
COUNCIL OF THE EUROPEAN UNION

Interinstitutional File: 2003/0024 (COD)

Brussels, 30 January 2004

5832/04

LIMITE
PI 11 CODEC 129

WORKING DOCUMENT
from: Swedish delegation

to: Working Party on Intellectual Property

No. prev. doc.: 5802/04 PI 10 CODEC 126
No. Cion prop.: 6777/03 PI 19 CULT 17 CODEC 204

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
- Drafting proposals for Articles 7, 8, 10, 12 and 17

Delegations will find attached drafting proposals for amending the above Articles as set out in 16289/03 PI 134 CODEC 1864.
Evidence

Article 7

1. Member States shall lay down that, on application by a party which has presented reasonably accessible evidence sufficient to support its claims, and has, in substantiating those claims, cited evidence which is to be found under the control of the opposing party, the competent judicial authorities may order that such evidence be produced by the opposing party, subject to the protection of confidential information.

2. Under the same conditions, in case of an infringement carried out on a commercial scale, Member States shall take such measures as are necessary to enable the competent judicial authorities to order, at the request of the plaintiff, the communication of banking, financial or commercial documents under the control of the defendant, subject to the protection of confidential information.

Explanation:

These measures should only be used in order get access to documents supporting claims that have been made, i.e. not for the sole purpose of identifying others involved in the infringement.

Measures for protecting evidence

Article 8

1. Member States shall ensure that the competent judicial authorities, on application by a party who has presented reasonably accessible evidence sufficient to support that his or her intellectual property right has been infringed or is about to be infringed, may order prompt and effective provisional measures to preserve relevant evidence in regard to the alleged infringement, subject to the protection of confidential information. These measures shall, if necessary, be taken without the other party having been heard, in particular where there is a demonstrable risk that evidence may be destroyed.
Where evidence-protection measures have been adopted without the other party having been heard, the affected parties shall be given notice immediately after the execution of the measures at the latest. A review, including a right to be heard, shall take place upon request of the affected parties with a view to deciding, within a reasonable period after the notification of the measures, whether the measures shall be modified, revoked or confirmed.

2. Member States shall lay down that the evidence-protection measures may be subject to the applicant’s lodging of an adequate security or equivalent assurance intended to ensure compensation for any prejudice suffered by the defendant as provided for in paragraph 4.

3. Member States shall lay down that the evidence-protection measures shall be revoked at the request of the defendant, without prejudice to the damages which may be claimed, if the applicant has not instituted legal proceedings leading to a decision on the merits of the case before the competent judicial authority within a reasonable interval, which shall be specified by the judicial authority ordering the measures when the law of a Member State permits or, in the absence of such specification, within an interval not exceeding 20 working days or 31 calendar days if longer.

4. Where the evidence-protection measures have been revoked, or where they lapse owing to any act or omission by the applicant, or where it is subsequently found that there has been no infringement or threat of infringement of any intellectual property right, the judicial authorities shall be empowered to order the applicant, at the defendant’s request, to provide the defendant with adequate compensation for any injury caused by the measures.

**Explanation:**

Member States should have an obligation to ensure that the competent judicial authorities may order prompt and effective provisional measures to preserve relevant evidence in regard to the alleged infringement. However, it should be up to Member States to decide how evidence shall be preserved. Today, some Member States use the seizure of documents while others use alternative
methods, e.g. makes copies. Both these methods are just as efficient and often deeply rooted in the legal traditions of the different Member States. There is no need to force Member States to use the same method for preserving evidence.

The measures should not be taken unless the right holder has presented reasonably accessible evidence sufficient to support that his or her intellectual property right has been infringed or is about to be infringed (cf. article 7).

It would be out of proportion to take these measures in a place which is not under the control of the infringer, e.g. in someone else’s home. Therefore, it would be misleading to use the words “in any place”.

Any measure taken under this article has to be subject to the protection of confidential information (cf. article 7).

Article 8.2-8.2 should apply to all evidence-protection measures in this article.

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Provisional measures

Article 10

1. Member States shall lay down that the judicial authorities may, at the request of the applicant:

   (a) serve the alleged infringer, or the intermediary whose services are being used by a third party to infringe a right, with an interlocutory injunction intended to prevent any impending infringement of an intellectual property right, or to forbid, on a provisional basis [and, if provided for by national law, subject to a recurring fine], the continuation of the alleged infringements of an intellectual property right, or to make such continuation subject to the lodging of guarantees intended to ensure the compensation of the right holder;

   (b) authorise the seizure of the goods suspected of infringing an intellectual property right so as to prevent their entry into or movement within the channels of commerce.
The judicial authorities shall have the authority to require the applicant to provide any reasonably available evidence in order to satisfy themselves with a sufficient degree of certainty that the applicant is the right holder and that the applicant's right is being infringed, or that such infringement is imminent.

1a. In cases of infringement committed on a commercial scale, the Member States shall lay down that, if the injured party demonstrates circumstances likely to endanger the recovery of damages, the judicial authorities may authorise the precautionary seizure of the movable and immovable property of the alleged infringer, including the blocking of his bank accounts and other assets []. To this end, the competent authorities shall have the possibility to get access to information about the alleged infringers bank- or other assets, if necessary by means of compulsion.

The judicial authorities shall have the authority to require the applicant to provide any reasonably available evidence in order to satisfy themselves with a sufficient degree of certainty that the applicant has a right to damages.

2. Member States shall lay down that the provisional measures referred to in paragraphs 1 and 1a may, in appropriate cases, be taken without the defendant having been heard, in particular when any delay would cause irreparable prejudice to the right holder. In the event of this happening, the parties shall be so informed without delay after the execution of the measures at the latest.

A review, including the right to be heard, shall take place upon request of the defendant with the view to deciding, within a reasonable time after notification of the measures, whether these measures shall be modified, revoked or confirmed.

3. Member States shall lay down that the provisional measures referred to in paragraphs 1 and 1a shall be revoked, upon request by the defendant, if the applicant does not institute proceedings leading to a decision on the merits of the case before the competent judicial authority within a
reasonable period to be determined by the judicial authority ordering the measures where the Member State's law so permits or, in the absence of such determination, not to exceed 20 working days or 31 calendar days, whichever is the longer.

4. The competent judicial authorities may make the provisional measures referred to in paragraphs 1 and 1a subject to the lodging by the applicant of adequate security or equivalent assurance intended to ensure any compensation of the prejudice suffered by the defendant as provided for in paragraph 5.

5. Where the provisional measures are revoked or where they lapse due to any act or omission by the applicant, or where it is subsequently found that there has been no infringement or threat of infringement of an intellectual property right, the judicial authorities shall have the authority to order the applicant, upon request of the defendant, to provide the defendant appropriate compensation for any injury caused by these measures.

Explanation:

In respect of the precautionary seizure of assets (article 10.1a), Member States should have an obligation to ensure that the competent authorities have the possibility to get access to information about the alleged infringers bank- or other assets, if necessary by means of compulsion. However, it should be up to Member States to decide how the authorities shall get hold of this information. Today, some Member States use the communication or seizure of documents, while others use alternative methods. Sweden has a system where the court authorise the precautionary seizure as such and determines the amount that shall be protected. Thereafter, it is up to the executive authorities to identify the infringers assets and to decide which assets shall be seized. To this end, the executive authorities can issue injunctions, subject to a fine, forcing anyone (including banks etc.) to provide information concerning the infringers assets. If someone still would refuse to provide the information, he or she can be detained. This is at least as efficient as the communication or seizure of documents. In other words, there is no need to force Member States to use the same method for getting access to information about the alleged infringers assets. Neither should the provision prevent Member States from having a system where it’s e.g. the executive authorities who identify the infringers assets.
The provisional measures in (a) and (b) are subject to the applicant providing any reasonably available evidence. The same should apply in respect to article 10.1a.

Article 10.4 (security) should apply to all provisional measures referred to in paragraphs 1 and 1a.

Corrective measures

Article 12

Without prejudice to the damages due to the right holder by reason of the infringement, Member States shall lay down that the competent judicial authorities may order that the goods that they have found to be infringing an intellectual property right and, in appropriate cases, the materials and implements principally used in the creation or manufacture of these goods, be, without compensation of any sort:

(a) recalled from the channels of commerce,
(b) destroyed, or
(c) that other measures shall be taken in order to prevent unauthorised use.

The judicial authorities shall order that these measures shall be carried out at the expense of the infringer, unless particular reasons are invoked for not doing so.

In considering a request for corrective measures, the need for proportionality between the seriousness of the infringement and the remedies ordered as well as the interests of third parties shall be taken into account.
Explanation:

This wording makes it clear that Member States, in order to prevent unauthorised use of infringing goods, may provide other corrective measures too. It also contains a proportionality test which is closer to the one used in article 46 of the TRIP:s-agreement and which makes it clear that it is possible to reject e.g. an application for the destruction of a building even if article 16 cannot apply.

**Damages**

*Preamble*

(24) It is of paramount importance that the right holder receives adequate compensation for the prejudice suffered as a result of an infringement committed by an infringer who has engaged in an activity in the knowledge, or with reasonable grounds for knowing, that it would give rise to such an infringement. Therefore, when calculating the damages, the judicial authorities shall take into account all appropriate aspects, such as the negative economic consequences, including lost profits, which the injured party has suffered, as well as any unfair profits made by the infringer and [in appropriate cases] other than economic factors, such as the moral prejudice caused to the right holder by the infringement. Since it is often too difficult or expensive to present evidence on the damage suffered, e.g. to prove lost profits, the judicial authorities must also be given the possibility to set the damages on the basis of a lump sum. In order to be adequate, such a lump sum could often be equal to double the royalties or fees which would have been due if the infringer had requested authorisation to use the intellectual property right in question.

*Article 17*

1. Member States shall lay down that the competent judicial authorities, on application by the injured party, shall order the infringer who knowingly, or with reasonable grounds to know, engaged in an infringing activity, to pay the right holder adequate damages corresponding to the actual prejudice suffered by him as a result of the infringement.
When the judicial authorities set the damages they shall take into account all appropriate aspects, such as the negative economic consequences, including lost profits, which the injured party has suffered, as well as any unfair profits made by the infringer and [in appropriate cases] other than economic factors, such as the moral prejudice caused to the right holder by the infringement.

In appropriate cases, as an alternative to the calculation just mentioned, the judicial authorities shall have the possibility to set the damages on the basis of an estimated lump sum.

2. Deleted.

3. Member States may lay down that the judicial authorities may order the recovery of profits and/or the payment of damages even where the infringer did not knowingly, or with reasonable grounds to know, engage in infringing activity.

Explanation:

The right holder should always receive damages corresponding to the actual prejudice suffered by him as a result of the infringement. However, in many cases it is too difficult or expensive to present evidence on the damage suffered, e.g. to prove lost profits. Therefore, the judicial authorities must also be given the possibility to set the damages on the basis of a lump sum. In order to be adequate, such a lump sum could often be equal to double the royalties or fees which would have been due if the infringer had requested authorisation to use the intellectual property right in question. However, in some cases it might be adequate with a lump sum equal to one and a half times these royalties or fees and in other cases it might be adequate with a lump sum equal to three times these royalties or fees. This article should not serve as a limitation in this respect. It is better to give guidance on the interpretation in the preamble, as proposed above.

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COUNCIL OF
THE EUROPEAN UNION

Interinstitutional File:
2003/0024 (COD)

WORKING DOCUMENT
from: Danish delegation
to: Working Party on Intellectual Property
No. prev. doc.: 5832/04 PI 11 CODEC 129
No. Cion prop.: 6777/03 PI 19 CULT 17 CODEC 204
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
- Suggestions for drafting amendments to Article 21(1)

Brussels, 30 January 2004
5862/04
LIMITE
PI 13
CODEC 132

Article 21

Legal protection of technical devices

1. […] Member States shall provide for appropriate legal protection against the manufacture, import, distribution and use of illegal technical devices. This provision is not applicable in the field of copyright, related rights and the sui generis right of the creator of a database.
COUNCIL OF THE EUROPEAN UNION

Interinstitutional File: 2003/0024 (COD)

WORKING DOCUMENT

from: Estonian delegation
to: Working Party on Intellectual Property

No. prev. doc.: 5862/04 PI 13 CODEC 132
No. Cion prop.: 6777/03 PI 19 CULT 17 CODEC 204

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 - Suggestions for drafting amendments to 16289/03

Delegations will find attached drafting suggestions concerning a number of provisions as set out in 16289/03 PI 134 CODEC 1864.
1. **Justification:**

   *We agree to the deletion of Article 20 in the consolidated text and agree to the relevant additions to Article 2(3) as in Presidency compromise proposal of 23.01.2004.*

   *In case criminal sanctions need to be mentioned in the directive, we suggest recital 25 could read as follows.*

**Recital 25**

In addition to the civil and administrative measures and procedures under this Directive, other measures also constitute, in appropriate cases, a means of ensuring the enforcement of intellectual property rights. However, any approximation of these measures should be undertaken, if deemed necessary, under the relevant Treaty provisions, rather that in this Directive.

2. **Justification:**

   *We concur with the respective UK proposal (5657/04) on Article 17(1). However, we would like to add (underlined) the aspect of moral prejudice from the respective Swedish proposal (5832/04) on Article 17(1).*

**Article 17**

**Damages**

1. Member States shall ensure that the competent judicial authorities, on application by the injured party, are able to order the infringer who knowingly, or with reasonable grounds to know, engaged in an infringing activity, to pay the right holder [appropriate] damages in reparation of the damage incurred by him as a result of the infringement.

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1 See Article 2(3)(b) and (c) in 5802/04.
The damages, which shall be of a non – punitive nature, may take into account all appropriate aspects, such as the foreseeable negative economic consequences which the injured party has suffered, including lost profits and any royalties or fees which would have been due if the infringer had requested authorisation to use the intellectual property right in question, or any unfair profits made by the infringer, and may include elements other than economic factors, such as the moral prejudice caused to the right holder by the infringement.

2. Deleted.

3. Member States may lay down that the judicial authorities may order the recovery of profits and/or the payment of damages even where the infringer did not knowingly, or with reasonable grounds to know, engage in infringing activity.
ADDENDUM to WORKING DOCUMENT

from: Presidency

to: Working Party on Intellectual Property

No. prev. doc.: 5657/04 PI 8 CODEC 105
No. Cion prop.: 6777/03 PI 19 CULT 17 CODEC 204

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 - Consolidated text: Recitals


Changes in relation to 6777/03 are indicated.
ANNEX

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on measures and procedures to ensure the enforcement of intellectual property rights

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,
Having regard to the Treaty establishing the European Community, and in particular Article 95 thereof,
Having regard to the proposal from the Commission¹,
Having regard to the opinion of the European Economic and Social Committee²,
Having regard to the opinion of the Committee of the Regions³,
Acting in accordance with the procedure laid down in Article 251 of the Treaty⁴,

Whereas:

(1) The achievement of the Internal Market entails eliminating restrictions on freedom of movement and distortions of competition, while creating an environment conducive to innovation and investment. In this context, the protection of intellectual property is an essential element for the success of the Internal Market. The protection of intellectual property is important not only for promoting innovation and creativity, but also for developing employment and improving competitiveness.

(2) The protection of intellectual property must allow the inventor or creator to derive a legitimate profit from his invention or creation. It must also allow the widest possible dissemination of works, ideas and new know-how. At the same time, the protection of intellectual property must not hamper freedom of expression or the free movement of information, or the protection of personal data, including on the Internet.

¹ OJ C […], […], p.[…].
² OJ C […], […], p.[…].
³ OJ C […], […], p.[…].
⁴ OJ C […], […], p.[…].
(3) However, without effective means of enforcing intellectual property, innovation and creativity are discouraged and investment diminished. It is therefore necessary to ensure that the substantive law on intellectual property, which is nowadays largely part of the acquis communautaire, is applied effectively in the Community. In this respect, the means of enforcing intellectual property rights are of paramount importance for the success of the single market.

(4) At international level, all Member States, as well as the Community itself as regards matters within its competence, are bound by the Agreement on Trade-Related Aspects of Intellectual Property (the "TRIPS Agreement"), approved, as part of the multilateral negotiations of the Uruguay Round, by Council Decision 94/800/EC\(^5\) concluded in the framework of the World Trade Organisation.

(5) The TRIPS Agreement contains, in particular, provisions on the means of enforcing intellectual property rights which are common standards applicable at international level and implemented in all Member States. The provisions of this Directive should not affect Member States’ international obligations, including those under the TRIPS Agreement.

(6) There are also international conventions to which all Member States are parties and which also contain provisions on the means of enforcing intellectual property rights. These include, in particular, the Paris Convention for the Protection of Industrial Property, the Berne Convention for the Protection of Literary and Artistic Works, and the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations.

(7) It emerges from the consultations held by the Commission on this question that, in the Member States, and despite the provisions of the TRIPS Agreement, there are still major disparities as regards the means of enforcing intellectual property rights. For instance, the arrangements for applying provisional measures, which are used in particular to safeguard

evidence, the calculation of damages, or the arrangements for applying injunctions, vary widely from one Member State to another. In some Member States, there are no measures and procedures such as the right of information and the recall, at the infringer's expense, of the infringing goods placed on the market.

(8) The disparities between the systems of the Member States for enforcing intellectual property rights are prejudicial to the proper functioning of the Internal Market and make it impossible to ensure that intellectual property rights enjoy an equivalent level of protection throughout the Community. This situation does not promote free movement within the Internal Market nor create an environment conducive to healthy competition.

(9) The current disparities also lead to a weakening of the substantive law on intellectual property and to a fragmentation of the Internal Market in this field. This causes a loss of confidence in the Internal Market in business circles, with a consequent reduction in investment in innovation and creation. Infringements appear to be increasingly linked to organised crime. Increasing use of the Internet enables pirated products to be distributed instantly around the globe. Effective enforcement of the substantive law on intellectual property, which is nowadays largely part of the *acquis communautaire*, must be ensured by specific action at Community level. Approximation of the legislation of the Member States in this field is therefore an essential prerequisite for the implementation of the Internal Market.

(10) The objective of this Directive is to approximate legislative systems so as to ensure a high, equivalent and homogeneous level of protection in the Internal Market. […]

(11) This Directive does not aim to establish harmonised rules for judicial cooperation, jurisdiction, the recognition and enforcement of decisions in civil and commercial matters, nor to deal with applicable law. There are Community instruments which govern such matters in general terms and are, in principle, equally applicable to intellectual property.

(12) This Directive should not affect the application of the rules of competition, and in particular Articles 81 and 82 of the Treaty.
(13) It is necessary to define the scope of this Directive as widely as possible in order to encompass all the intellectual property rights covered by Community provisions in this field and/or by the national law of the Member State concerned [...]. Nevertheless, that requirement does not affect the possibility, on the part of those Member States which so wish, to extend, for internal purposes, the provisions of this Directive to include acts involving unfair competition, including parasitic copies, or similar activities.

(13a) Certain measures specifically identified in this Directive need to be applied only in respect of acts committed on a commercial scale. The acts which are committed on a commercial scale are those carried out for direct or indirect economic or commercial advantage; this would normally exclude acts done by end consumers acting in good faith.


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(16) […] 

(17) […] The persons entitled to request application of these measures and procedures should be not only the right holders but also persons who have a direct interest and legal standing in accordance with the applicable law, which includes professional organisations in charge of the management of those rights or for the defence of the collective and individual interests for which they are responsible.

(18) Since copyright exists from the creation of a work and does not require formal registration as in the case of industrial property, it is appropriate to adopt the rule in Article 15 of the Berne Convention, which establishes the presumption whereby the author of a literary or artistic work is regarded as such if his name appears on the work. […] A similar presumption should be applied to the owners of related rights since often it is the holder of a related right, such as a phonogram producer, who will seek to defend rights and engage in fighting acts of piracy also on behalf of other right holders such as authors.

(19) Given that evidence is an element of paramount importance for establishing the infringement of intellectual property rights, it is appropriate to ensure that effective means of presenting, […] obtaining and protecting evidence are available […]. The procedures must have regard to the rights of the defence and must provide the necessary guarantees including the protection of confidential information. For infringements carried out on a commercial scale it is also important that the courts may order access, where appropriate, to banking, financial or commercial documents under the control of the alleged infringer.

(20) […]

(21) Other measures designed to ensure a high level of protection exist in certain countries and must be made available in all the Member States. This is the case with the right of information, which allows precise information to be obtained on the origin of the infringing goods or services, the distribution channels and the identity of the third parties involved in the infringement […].
(22) It is also essential to provide for provisional measures allowing for the immediate termination of the infringement without awaiting a decision on the substance of the case, while observing the rights of the defence, ensuring the proportionality of the provisional measures as appropriate to the characteristics of the case in question and providing the guarantees needed to cover the costs and the injury caused to the defendant by an unjustified request. Such measures are particularly justified when any delay would cause irreparable prejudice to the holder of an intellectual property right.

(23) Depending on the particular case, and if justified by circumstances, the measures and procedures to be provided for should include prohibitory measures aimed at preventing further infringements of intellectual property rights. Moreover, there should be […] corrective measures, where appropriate at the expense of the infringer, […] such as the recall […] the removal definitively from the channels of commerce, or destruction […] of the infringing goods and in appropriate cases the materials and implements principally used in the creation or manufacture of these goods. These corrective measures should take account of the interests of third parties including, in particular, consumers and private parties acting in good faith.

(24) With a view to compensating for the prejudice suffered as a result of an infringement committed by an infringer who has engaged in an activity in the knowledge, or with reasonable grounds for knowing, that it would give rise to such an infringement, the amount of damages awarded to the right holder should be set either as a lump sum of up to double the royalties or fees which would have been due if the infringer had requested authorisation to use the intellectual property right in question (the aim being not to introduce an obligation to provide for punitive damages but to allow for compensation based on an objective criterion while taking account of the expenses incurred by the right holder, such as the costs of identification and research), or according to the actual prejudice (including loss of earnings) suffered by the right holder […], to which must be added any unfair profits made by the infringer […]. In the latter case, it must also be possible to take into account other elements, such as the moral prejudice caused to the right holder.
(24a) To act as a supplementary deterrent to future infringers and contribute to the awareness of the public at large, it is useful to publicise judgments in intellectual property infringement cases.

(25) In addition to the civil and administrative measures and procedures provided for under this Directive, criminal sanctions also constitute, in appropriate cases, a means of ensuring the enforcement of intellectual property rights. However, any approximation of criminal sanctions should be undertaken, if deemed necessary, under the relevant Treaty provisions, rather than in this Directive.

(26) [Protection measures make a major contribution towards combating infringements of intellectual property.] Appropriate legal protection of security and authentification devices which protect against copying, manipulation or neutralisation is [therefore] necessary in the field of industrial property, and already exists in the field of copyright. Moreover, these protection measures targeting the abuse of technical devices to infringe intellectual property rights are in line with Article 6 of the Convention on Cybercrime adopted by the Council of Europe in Budapest on 23 November 2001.

(27) Industry must take an active part in the fight against piracy and counterfeiting. The development of codes of conduct in the circles directly affected is a supplementary means of bolstering the regulatory framework. The Member States, in collaboration with the Commission, should encourage the development of codes of conduct in general. Monitoring of the manufacture of optical discs, particularly by means of an identification code embedded in discs produced on the territory of the Community, helps to limit infringements of intellectual property in this sector which suffers from piracy on a large scale. However, these technical protection measures must not be misused with a view to protecting markets and preventing parallel imports.
(28) In order to facilitate the uniform application of the provisions set out in this Directive, it is appropriate to provide for systems of cooperation and mutual assistance between Member States, on the one hand, and between the Member States and the Commission on the other, in particular by creating a network of correspondents designated by the Member States and by providing regular reports assessing the application of this Directive and the effectiveness of the measures taken by the various national bodies. Within this framework, a Contact Committee made up of national correspondents could also be set up within the Commission.

(29) Since the objectives of this Directive cannot be sufficiently achieved by the Member States for the reasons already described, and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality as set out in that Article, this Directive does not go beyond what is necessary in order to achieve its objectives.

(30) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular, this Directive seeks to ensure full respect for intellectual property (Article 17(2) of the Charter of Fundamental Rights of the European Union),
WORKING DOCUMENT
from: Netherlands delegation
to: Working Party on Intellectual Property
No. prev. doc.: 5863/04 PI 14 CODEC 133
No. Cion prop.: 6777/03 PI 19 CULT 17 CODEC 204
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
- Suggestions for drafting amendments to 16289/03

Article 5

Persons entitled to apply for the application of the measures and procedures

1. Member States shall recognise as persons entitled to seek application of the measures and procedures referred to in this Chapter the holders of intellectual property rights, […] licensees and sublicensees in so far as they are explicitly authorised to that purpose by the holder of the intellectual property right and […] in so far as permitted by and in accordance with the provisions of the applicable law, or their representatives.

2. Paragraph 1 shall apply mutatis mutandis to rights management bodies, federations, and associations having legal standing to assert such rights, regardless of the Member State in which the rights management body, federation or association is established. Member States may make an exception for the measures provided for in Articles 16 and 17.
Explanation:

Section 1: The (sub)licensees that are explicitly authorised by the holder of the IP right to initiate proceedings can be the only “persons authorised to use those rights” who are relevant in this context. So there is no need to make a distinction between licensees and other persons.

Section 2: If the organisations mentioned in section 1 would have the right to ask for damages (and the “pecuniary compensation of Article 16) on behalf of their right holders, how should the division of the damages to the right holders take place? As far as this delegation is informed, there is no Member State where the recovery of damages by way of a group action is allowed, neither is there any EU directive containing a precedent in this direction (see e.g. Directive 98/27/EC on injunctions for the protection of consumers’ interests (OJ EC 1998, L 166/51), which contains only a procedure for injunctions, not for damages).

Article 8

Measures for protecting evidence

4. Where the evidence protection measures have been revoked, or where they lapse owing to any act or omission by the applicant, or where it is subsequently found that there has been no infringement or threat of infringement of any intellectual property right, or where it is subsequently found that the measures have been disproportional in relation to the seriousness of the infringement, the judicial authorities shall be empowered to order the applicant, at the defendant’s request, to provide the defendant with adequate compensation for any injury caused by the measures.

Explanation

Also in case of an infringement, the measures taken to protect the evidence can be disproportional and cause injury to the infringer. If the right holder has the impression that the infringement is a serious case of large-scale counterfeit or piracy, and he has got authorisation for the whole range of
measures – seizure off all allegedly infringing products, production materials and documents – but it turns out to be just a very small infringement (in number or in scope), then these measures can be out of all proportion to the infringement. Therefore, damages should be possible also in case of disproportional measures.

Article 10

Provisional measures

5. Where the provisional measures have been revoked or where they lapse due to any act or omission by the applicant, or where it is subsequently found that there has been no infringement or threat of infringement of an intellectual property right, or where it is subsequently found that the measures have been disproportional in relation to the seriousness of the infringement, the judicial authorities must be empowered to order the applicant, at the request of the defendant, to provide the defendant with adequate compensation for any injury caused by these measures.

Explanation

Mutatis mutandis as for article 8.
A. **INTRODUCTION**


   The Economic and Social Committee gave its Opinion on 29 October 2003 (OJ C 32 of 5.2.2004, p. 15).

   The Committee of the Regions informed the Council by letter dated 22 May 2003 that it will not issue an opinion on this document.
2. The Committee on Legal Affairs and the Internal Market of the European Parliament voted a number of amendments to the Commission proposal on 27 November 2003. Shortly thereafter, it informed the Council of its hope that the European Parliament and the Council could adopt the Directive at first reading.

Since early January 2004, a number of informal meetings have been held to that end, while work has continued intensively in the Council's Working Party on Intellectual Property.

3. Since the European Parliament intends to adopt its Opinion at its session on 25 and 26 February 2004, it is necessary for the Permanent Representatives Committee to determine whether the conditions for agreement at first reading are met. To that end, the main outstanding questions are summarised in this report. Other reservations are mentioned in the footnotes to the text of the proposal set out in the Annex to this report.

B. MAIN OUTSTANDING QUESTIONS

Criminal sanctions

4. The Commission has proposed not only civil and administrative measures and procedures as means of ensuring the enforcement of intellectual property rights, but also an Article 20 concerning criminal law provisions. All delegations, while not contesting that criminal sanctions are an essential means of combating counterfeiting and piracy, and that all Member States are obliged under Article 61 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) to provide for criminal procedures and penalties in this respect, consider that it is not appropriate to include criminal law provisions in a Directive based on Article 95 of the EC Treaty.

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1 The changes in relation to 5802/04 + ADD 1 are indicated.
5. The Legal Affairs Committee of the European Parliament, in which views are divided as to whether or not criminal sanctions should be provided for explicitly in this Directive, has proposed the following amendment: "Without prejudice to the civil and administrative measures and procedures laid down by this Directive, Member States shall apply appropriate sanctions in cases where intellectual property rights have been infringed." No delegation is able to accept this amendment, since it would entail an obligation in a Directive based on Article 95 of the EC Treaty for Member States to apply sanctions which, implicitly, could only be criminal sanctions.

6. The Presidency has put forward a compromise proposal comprising the following elements:

   (a) Recital 25 which, while recognising that criminal sanctions constitute, in appropriate cases, a means of ensuring the enforcement of intellectual property rights, indicates that any approximation of criminal sanctions should be undertaken under the relevant Treaty provisions;

   (b) Article 2(3)(c), which states that the proposed Directive shall not affect any national provisions in Member States relating to criminal procedures or penalties in respect of infringement of intellectual property rights;

   (c) Article 20, which follows closely the wording of the amendment proposed by the Parliament's Legal Affairs Committee, but is optional for Member States.

   All delegations have reserved their position on this compromise proposal but are prepared to consider it in the light of the comments made by the Council Legal Service.

   The Presidency considers that this compromise proposal is the only proposal which might be acceptable to both Council and Parliament.

   The Commission maintains its proposal.
7. **The Permanent Representatives Committee** is asked to decide whether it can accept this Presidency compromise proposal.

**Scope of the Directive**

8. **The Commission** proposed (Article 2) that the Directive should apply to "any infringement of rights deriving from Community and European acts on the protection of intellectual property, as listed in the Annex, and from the provisions adopted by the Member States in order to comply with those acts …".

The Parliament's Legal Affairs Committee proposed removing the reference to European acts and to the Annex. As a result of contacts between the Presidency and the European Parliament, there is a broad consensus in favour of the text of Article 2 whereby the Directive would apply "… to any infringement of intellectual property rights as provided for by Community law and/or by the national law of the Member State concerned."

The Belgian, Netherlands and Swedish delegations could accept this text if it were to be accompanied by a list of the rights concerned. The Swedish delegation also has a reservation as to whether the Community has the competence to harmonise enforcement measures in respect of intellectual property rights where the Community has not harmonised the substantive rights. The Slovenian delegation would prefer to exclude patent rights and supplementary protection certificates from the scope of the Directive.

9. **The Permanent Representatives Committee** is invited to approve this text as it stands.

10. **The Commission** proposed that the Directive be limited to infringements committed for commercial purposes or which cause significant harm to the right holder. The Parliament's Legal Affairs Committee proposed that this limitation be removed.
The majority of delegations can accept a compromise solution whereby the scope of the Directive as a whole is not limited as proposed by the Commission, but certain provisions (Articles 7(2), 9(1) and 10(1a)) are limited to acts committed on a commercial scale. Recital 13a gives interpretative guidance to the term "on a commercial scale".

The Portuguese delegation and the Commission continue to support the Commission's proposal. The Netherlands delegation considers that the scope should be limited to cases of serious and systematic infringements committed on a commercial scale and in bad faith. The French delegation proposes that Articles 7(2) and 9(1) refer to "acts committed on a commercial scale and/or with a view to a direct or indirect economic interest", proposes no limitation in Article 10(1a), and would prefer to delete Recital 13a. The Belgian, German, Austrian and Portuguese delegations have scrutiny reservations on the wording of Recital 13a.

11. The Permanent Representatives Committee is invited to approve the solution acceptable to the majority of delegations.

12. The proposal for a Directive is a minimum Directive in the sense that it is "without prejudice to the means which are or may be provided for in Community or national legislation, in so far as those means may be more favourable for right holders" (Article 2(1)).

The Belgian, French, Spanish, United Kingdom and Luxembourg delegations have expressed reservations with regard to certain aspects of Article 8(1) which they consider to be less favourable to rightholders than provisions in their national laws. The Belgian, French and Italian delegations have also expressed reservations with regard to Article 16, which they consider to be contrary to the aim of combating piracy and counterfeiting. These delegations have been invited to review their positions in the light of the above clause in Article 2(1).
**Intermediaries**

13. The Belgian, German, Luxembourg and United Kingdom delegations have expressed reservations with regard to the possibility of an interlocutory injunction being issued against an intermediary under Article 10(1)(a), and the Belgian, Spanish and United Kingdom delegations have expressed similar reservations with regard to the corresponding provision in Article 15.

These provisions have been reformulated to make it clear that they relate to industrial property rights only, as the question of injunctions against intermediaries with regard to copyright and related rights is regulated in Directive 2001/29/EC, and the proposed Directive is without prejudice to the relevant provisions of that Directive by virtue of Article 2(2) of the proposed Directive. In addition, an explanatory Recital 22a has been added.

The delegations concerned have been invited to review their positions in the light of the reformulations and the recital referred to above.

**Right of information**

14. Article 47 of the TRIPS Agreement contains an option for States to provide for judicial authorities to order an infringer to inform the right holder of the identity of third persons involved in the production and distribution of the infringing goods or services and of their channels of distribution.

The Commission proposed a binding, rather than an optional, provision, which would also allow the right of information to be used in relation to certain persons other than the infringer, and would allow it to be used not only where an infringement has been established, but also where an infringement has been alleged (Article 9).
The amendments proposed by the Parliament's Legal Affairs Committee correspond broadly to the scope of this right as proposed by the Commission, while introducing some additional safeguards.

Following reservations from several delegations in respect of several aspects of this Article, the text as now proposed by the Presidency, while maintaining a binding provision, limits its scope to cases where an infringement has already been established by the courts. This right may be used not only in relation to the infringer, but also to the persons listed in paragraph 1(a), (b), (ba) and (c). Delegations have been asked to review their positions in the light of the changes made to this Article.

**Legal basis**

15. The Commission has proposed Article 95 of the EC Treaty as the legal basis for the proposed Directive.

The Danish delegation has raised the question whether, since Articles 7 to 15 of the proposal relate to questions of civil law and civil procedural law, Article 65 should also be used as a legal basis.

The Council Legal Service has been requested to give an opinion on this question.

**C. CONCLUSION**

16. The Permanent Representatives Committee is invited to examine the questions set out above, as well as the other reservations mentioned in footnotes, with a view to determining whether the conditions are met for agreement at first reading on the proposal for a Directive.
Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on measures and procedures to ensure the enforcement of intellectual property rights

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,
Having regard to the Treaty establishing the European Community, and in particular Article 95 thereof,
Having regard to the proposal from the Commission,
Having regard to the opinion of the European Economic and Social Committee,
Having regard to the opinion of the Committee of the Regions,
Acting in accordance with the procedure laid down in Article 251 of the Treaty,
Whereas:

(1) The achievement of the Internal Market entails eliminating restrictions on freedom of movement and distortions of competition, while creating an environment conducive to innovation and investment. In this context, the protection of intellectual property is an essential element for the success of the Internal Market. The protection of intellectual property is important not only for promoting innovation and creativity, but also for developing employment and improving competitiveness.

(2) The protection of intellectual property must allow the inventor or creator to derive a legitimate profit from his invention or creation. It must also allow the widest possible
dissemination of works, ideas and new know-how. At the same time, the protection of intellectual property must not hamper freedom of expression or the free movement of information, or the protection of personal data, including on the Internet.

(3) However, without effective means of enforcing intellectual property, innovation and creativity are discouraged and investment diminished. It is therefore necessary to ensure that the substantive law on intellectual property, which is nowadays largely part of the *acquis communautaire*, is applied effectively in the Community. In this respect, the means of enforcing intellectual property rights are of paramount importance for the success of the single market.

(4) At international level, all Member States, as well as the Community itself as regards matters within its competence, are bound by the Agreement on Trade-Related Aspects of Intellectual Property (the "TRIPS Agreement"), approved, as part of the multilateral negotiations of the Uruguay Round, by Council Decision 94/800/EC\(^8\) concluded in the framework of the World Trade Organisation.

(5) The TRIPS Agreement contains, in particular, provisions on the means of enforcing intellectual property rights which are common standards applicable at international level and implemented in all Member States. The provisions of this Directive should not affect Member States’ international obligations, including those under the TRIPS Agreement.

(6) There are also international conventions to which all Member States are parties and which also contain provisions on the means of enforcing intellectual property rights. These include, in particular, the Paris Convention for the Protection of Industrial Property, the Berne Convention for the Protection of Literary and Artistic Works, and the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations.

(7) It emerges from the consultations held by the Commission on this question that, in the Member States, and despite the provisions of the TRIPS Agreement, there are still major disparities as regards the means of enforcing intellectual property rights. For instance, the arrangements for applying provisional measures, which are used in particular to safeguard

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evidence, the calculation of damages, or the arrangements for applying injunctions, vary widely from one Member State to another. In some Member States, there are no measures and procedures such as the right of information and the recall, at the infringer's expense, of the infringing goods placed on the market.

(8) The disparities between the systems of the Member States for enforcing intellectual property rights are prejudicial to the proper functioning of the Internal Market and make it impossible to ensure that intellectual property rights enjoy an equivalent level of protection throughout the Community. This situation does not promote free movement within the Internal Market nor create an environment conducive to healthy competition.

(9) The current disparities also lead to a weakening of the substantive law on intellectual property and to a fragmentation of the Internal Market in this field. This causes a loss of confidence in the Internal Market in business circles, with a consequent reduction in investment in innovation and creation. Infringements appear to be increasingly linked to organised crime. Increasing use of the Internet enables pirated products to be distributed instantly around the globe. Effective enforcement of the substantive law on intellectual property, which is nowadays largely part of the *acquis communautaire*, must be ensured by specific action at Community level. Approximation of the legislation of the Member States in this field is therefore an essential prerequisite for the implementation of the Internal Market.

(10) The objective of this Directive is to approximate legislative systems so as to ensure a high, equivalent and homogeneous level of protection in the Internal Market.

(11) This Directive does not aim to establish harmonised rules for judicial cooperation, jurisdiction, the recognition and enforcement of decisions in civil and commercial matters, nor to deal with applicable law. There are Community instruments which govern such matters in general terms and are, in principle, equally applicable to intellectual property.

(12) This Directive should not affect the application of the rules of competition, and in particular Articles 81 and 82 of the Treaty.
(13) It is necessary to define the scope of this Directive as widely as possible in order to encompass all the intellectual property rights covered by Community provisions in this field and/or by the national law of the Member State concerned. Nevertheless, that requirement does not affect the possibility, on the part of those Member States which so wish, to extend, for internal purposes, the provisions of this Directive to include acts involving unfair competition, including parasitic copies, or similar activities.

(13a) The measures provided for in Articles 7(2), 9(1) and 10(1a) of this Directive need to be applied only in respect of acts committed on a commercial scale. This is without prejudice to the possibility for Member States to apply these measures also in respect of other acts. The acts which are committed on a commercial scale are those carried out for direct or indirect economic or commercial advantage; this would normally\(^9\) exclude acts done by end consumers acting in good faith.\(^10\)


(15) The provisions of this Directive are without prejudice to the particular provisions for the enforcement of rights and on exceptions in the domain of copyright and related rights set out in Community instruments and notably those found in Council Directive 91/250/EEC of

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\(^9\) A, P : delete "normally".
\(^10\) NL, F : reservation on recital 13a. If it were to be maintained, F would like to see the reference to Article 10(1a) and the last sentence deleted. B, D scrutiny reservations on the wording of this recital.
\(^12\) OJ L 13, 19.1.2000, p. 12.
14 May 1991 on the legal protection of computer programs\textsuperscript{14} or Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society\textsuperscript{15}.

(16) The measures and remedies provided for in this Directive should be determined in each case in such a manner as to take due account of the specific characteristics of that case, including the specific features of each intellectual property right and, where appropriate, the intentional or unintentional character of the infringement.\textsuperscript{16,17}

(17) The persons entitled to request application of these measures and procedures should be not only the right holders but also persons who have a direct interest and legal standing in so far as permitted by and in accordance with the applicable law, which may include professional organisations in charge of the management of those rights or for the defence of the collective and individual interests for which they are responsible.

(18) Since copyright exists from the creation of a work and does not require formal registration […], it is appropriate to adopt the rule in Article 15 of the Berne Convention, which establishes the presumption whereby the author of a literary or artistic work is regarded as such if his name appears on the work. A similar presumption should be applied to the owners of related rights since often it is the holder of a related right, such as a phonogram producer, who will seek to defend rights and engage in fighting acts of piracy […].

(19) Given that evidence is an element of paramount importance for establishing the infringement of intellectual property rights, it is appropriate to ensure that effective means of presenting, obtaining and protecting evidence are available. The procedures must have regard to the rights of the defence and must provide the necessary guarantees including the protection of confidential information. For infringements carried out on a commercial scale it is also important that the courts may order access, where appropriate, to banking, financial or commercial documents under the control of the alleged infringer.

\textsuperscript{14} OJ L 122, 17.5.1991, p. 42.
\textsuperscript{15} OJ L 167, 22.6.2001, p. 10.
\textsuperscript{16} P : delete " and, where appropriate, the intentional or unintentional character of the infringement".
\textsuperscript{17} COM : add "and whether the infringement is committed on a commercial scale or causes significant harm to the right holder".
(20) Deleted.\(^{18}\)

(21) Other measures designed to ensure a high level of protection exist in certain countries and must be made available in all the Member States. This is the case with the right of information, which allows precise information to be obtained on the origin of the infringing goods or services, the distribution channels and the identity of the third parties involved in the infringement.

(22) It is also essential to provide for provisional measures allowing for the immediate termination of the infringement without awaiting a decision on the substance of the case, while observing the rights of the defence, ensuring the proportionality of the provisional measures as appropriate to the characteristics of the case in question and providing the guarantees needed to cover the costs and the injury caused to the defendant by an unjustified request. Such measures are particularly justified when any delay would cause irreparable prejudice to the holder of an intellectual property right.

(22a) Without prejudice to any other measures and remedies available, rightholders should have the possibility of applying for an injunction against an intermediary whose services are being used by a third party to infringe the rightholder's right. The conditions and modalities relating to such injunctions should be left to the national law of the Member States.

(23) Depending on the particular case, and if justified by circumstances, the measures and procedures to be provided for should include prohibitory measures aimed at preventing further infringements of intellectual property rights. Moreover there should be corrective measures, where appropriate at the expense of the infringer, such as the recall, the removal definitively from the channels of commerce, or destruction of the infringing goods and in appropriate cases the materials and implements principally used in the creation or manufacture of these goods. These corrective measures should take account of the interests of third parties including, in particular, consumers and private parties acting in good faith.

\(^{18}\) F suggested a new recital 20: "Carriers incorporating intellectual property rights constitute goods within the meaning of Article 8".
(23a) Member States should have the option of providing, in cases where an infringement has been carried out unintentionally and without negligence and where the corrective measures or injunctions provided for by this Directive would be disproportionate, for the possibility, in appropriate cases, of pecuniary compensation being awarded to the injured party as an alternative measure. However, where the commercial use of counterfeit goods or the supply of services would constitute an infringement of law other than intellectual property law or would be likely to harm consumers, such use or supply should remain prohibited.

(24) With a view to compensating for the prejudice suffered as a result of an infringement committed by an infringer who has engaged in an activity in the knowledge, or with reasonable grounds for knowing, that it would give rise to such an infringement, the amount of damages awarded to the right holder should take account of all appropriate aspects, such as loss of earnings incurred by the right holder, or unfair profits made by the infringer and, where appropriate, any moral prejudice caused to the right holder. As an alternative, for example where it would be difficult to determine the amount of the actual prejudice suffered, the amount of the damages might be derived from elements such as the royalties or fees which would have been due if the infringer had requested authorisation to use the intellectual property right in question (the aim being not to introduce an obligation to provide for punitive damages but to allow for compensation based on an objective criterion while taking account of the expenses incurred by the right holder, such as the costs of identification and research) […].

(24a) To act as a supplementary deterrent to future infringers and contribute to the awareness of the public at large, it is useful to publicise judgments in intellectual property infringement cases.

[25] In addition to the civil and administrative measures and procedures provided for under this Directive, criminal sanctions also constitute, in appropriate cases, a means of ensuring the enforcement of intellectual property rights. However, to the extent that any approximation of
criminal sanctions is deemed necessary, it should be undertaken under the relevant Treaty provisions [...] 19

(26) Deleted.

(27) Industry must take an active part in the fight against piracy and counterfeiting. The development of codes of conduct in the circles directly affected is a supplementary means of bolstering the regulatory framework. The Member States, in collaboration with the Commission, should encourage the development of codes of conduct in general. Monitoring of the manufacture of optical discs, particularly by means of an identification code embedded in discs produced on the territory of the Community, helps to limit infringements of intellectual property in this sector which suffers from piracy on a large scale. However, these technical protection measures must not be misused with a view to protecting markets and preventing parallel imports.

(28) In order to facilitate the uniform application of the provisions set out in this Directive, it is appropriate to provide for [...] cooperation and the exchange of information between Member States, on the one hand, and between the Member States and the Commission on the other, in particular by creating a network of correspondents designated by the Member States and by providing regular reports assessing the application of this Directive and the effectiveness of the measures taken by the various national bodies. [...] 

(29) Since, for the reasons already described, the objectives of this Directive [...] can best be achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality as set out in that Article, this Directive does not go beyond what is necessary in order to achieve its objectives.

(30) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular, this Directive seeks to ensure full respect for intellectual property (Article 17(2) of the Charter of Fundamental Rights of the European Union),

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HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I

OBJECTIVE AND SCOPE

Article 1

Subject-matter

This Directive concerns the measures and procedures necessary to ensure the enforcement of intellectual property rights. For the purposes of this Directive, the term "intellectual property rights" includes industrial property rights.

Article 2

Scope

1. Without prejudice to the means which are or may be provided for in Community or national legislation, in so far as those means may be more favourable for right holders, the measures and procedures provided for by this Directive shall apply, in accordance with Article 3, to any infringement of intellectual property rights as provided for by Community law and/or by the national law of the Member State concerned.\(^{20}\)

\(^{20}\) S : reservation on the competence of the Community to harmonise measures and/or procedures regarding the enforcement of national intellectual property rights, for which no substantive harmonisation has taken place in the Community. SL requested exemption of patent rights and of supplementary protection certificates.

\(^{21}\) S, NL, B : for legal certainty, need to list all the IP rights covered by the Directive.

\(^{22}\) P, COM : reservation on the deletion of the limitation of the scope appearing in the Commission proposal. NL would prefer a limitation of the scope to cases of serious and systematic infringements committed on a commercial scale and in bad faith.
2. This Directive shall be without prejudice to the particular provisions on the enforcement of rights and on exceptions contained in Community legislation concerning copyright and rights related to copyright, notably those found in Directive 91/250/EEC or Directive 2001/29/EC and, in particular, Articles 2 to 5 and Article 8 of that Directive.\(^\text{23}\)

3. This Directive shall not affect:

(a) the Community provisions governing the substantive law on intellectual property, Directive 95/46/EC, Directive 1999/93/EC or Directive 2000/31/EC in general, and the provisions of Articles 12 to 15 in particular of that Directive;

(b) Member States’ international obligations and notably the Agreement on Trade-Related Aspects of Intellectual Property Rights (the “TRIPS Agreement”), including those relating to criminal procedures and penalties;

[(c) any national provisions in Member States relating to criminal procedures or penalties in respect of infringement of intellectual property rights.]\(^\text{24}\)

\(^{23}\) F, D, S, NL, B, E, UK: reservation on the appropriateness of referring to specific Articles in (2) and (3)(a) but broad agreement to consider it positively in the context of a package deal with the EP. UK: if such reference is maintained, need to add Article 6 of Directive 2001/29/EC.

\(^{24}\) D, UK, S, NL, DK, E: reservation on references to criminal law in (3)(b) and (c).
CHAPTER II
MEASURES AND PROCEDURES

SECTION 1
GENERAL PROVISIONS

Article 3
General obligation

Member States shall provide for the measures, procedures and remedies needed to ensure the enforcement of the intellectual property rights covered by this Directive. These measures, procedures and remedies shall be fair and equitable, and shall not be unnecessarily complicated or costly, nor entail unreasonable time-limits or unwarranted delays.

The measures and remedies shall also be effective, proportionate and dissuasive and shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.

[...]²⁵

Article 4
Penalties

Merged with Article 3.

²⁵ F : reservation on the transfer of the third subparagraph of Article 3 to the recitals (recital 16). COM : scrutiny reservation.
Article 5

Persons entitled to apply for the application of the measures and procedures

26 Member States shall recognise as persons entitled to seek application of the measures and procedures referred to in this Chapter:

- the holders of intellectual property rights in accordance with the provisions of the applicable law, 27

- all other persons authorised to use those rights, in particular licensees, in so far as permitted by and in accordance with the provisions of the applicable law,

- intellectual property collective rights management bodies which are regularly recognised as having a right to represent holders of intellectual property rights, in so far as permitted by and in accordance with the applicable law, 28

- professional defence bodies which are regularly recognised as having a right to represent holders of intellectual property rights, in so far as permitted by and in accordance with the applicable law. 29

26 B : Insert "Unless otherwise provided by this Directive, ..." in order to be able in specific Articles to limit the persons entitled to act.
27 E : replace "applicable law" by "law of the Member State in which the court is situated" throughout Article 5.
28 DK : reservation on third indent.
29 F : scrutiny reservation on Article 5.
Article 6
Presumption of authorship or ownership

For the purposes of applying the measures and procedures provided for in this Directive,

(a) in order that the author of a literary or artistic work, in the absence of proof to the contrary, be regarded as such, and consequently be entitled to institute infringement proceedings, it shall be sufficient for his name to appear on the work in the usual manner;

(b) the provision under (a) shall apply mutatis mutandis to the holders of rights related to copyright with regard to their protected subject matter.\(^{30}\)\(^{31}\)

SECTION 2
EVIDENCE

Article 7
Evidence

1. Member States shall ensure that, on application by a party which has presented reasonably available evidence sufficient to support its claims, and has, in substantiating those claims, specified evidence which lies in the control of the opposing party, the competent judicial authorities may order that such evidence be produced by the opposing party, subject to the protection of confidential information.\(^{32}\) For the purposes of this paragraph, Member States may provide that a reasonable sample of a substantial number of copies of a work or any other protected object be considered by the competent judicial authorities to constitute reasonable evidence.\(^{33}\)

\(^{30}\) F: add "as such".
\(^{31}\) UK: scrutiny reservation, in particular in relation to performers' rights.
\(^{32}\) DK, B: clarify that "confidential information" shall be determined by national law.
\(^{33}\) F: replace the last sentence of (1) by "When a substantial number of goods allegedly infringes an intellectual property right, the judiciary authorities may consider, on the basis of a significant sample of these goods, that evidence of the alleged infringement has been sufficiently provided".
2. Under the same conditions, in the case of an infringement carried out on a commercial scale, Member States shall take such measures as are necessary to enable the competent judicial authorities to order, where appropriate, on application by a party, the communication of banking, financial or commercial documents under the control of the opposing party, subject to the protection of confidential information.

Article 8
Measures for protecting evidence

1. Member States shall ensure that even before the commencement of proceedings on the merits of the case the competent judicial authorities may, on application by a party who has presented reasonably available evidence to support his claims that his intellectual property right has been infringed or is about to be infringed, order prompt and effective provisional measures to preserve relevant evidence in regard to the alleged infringement, subject to the protection of confidential information. Such measures may include the detailed description, with or without the taking of samples, or the physical seizure of the infringing goods, and, in appropriate cases, the materials and implements used in the production and/or distribution of these goods and the documents relating thereto. These measures shall be taken, if necessary without the other party having been heard, in particular where any delay is likely to cause irreparable harm to the right holder, or where there is a demonstrable risk of evidence being destroyed.

Where evidence-protection measures have been adopted without the other party having been heard, the affected parties shall be given notice immediately after the execution of the measures at the latest. A review, including a right to be heard, shall take place upon request of

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34 F : insert "and/or with a view to a direct or indirect economic interest"
35 I, P : scrutiny reservation.
36 DK : reservation on Article 8, too detailed.
37 F : replace "who has presented reasonably available evidence to support his claims" by "who alleges". B, E, UK, LUX share the French concerns but indicated their willingness to reconsider in the light of clarifications given by the Council Legal Service regarding Article 2(1).
38 F : delete "and, in appropriate cases, the materials and implements used in the production and/or distribution of these goods and the documents relating thereto".
the affected parties with a view to deciding, within a reasonable period after the notification of the measures, whether the measures shall be modified, revoked or confirmed.

2. Member States shall ensure that the evidence-protection measures may be subject to the applicant’s lodging of an adequate security or equivalent assurance intended to ensure compensation for any prejudice suffered by the defendant as provided for in paragraph 4.

3. Member States shall ensure that the evidence-protection measures shall be revoked or otherwise cease to have effect upon request by the defendant, without prejudice to the damages which may be claimed, if the applicant has not instituted legal proceedings leading to a decision on the merits of the case before the competent judicial authority within a reasonable period, to be determined by the judicial authority ordering the measures when the law of a Member State so permits or, in the absence of such determination, within a period not to exceed 20 working days or 31 calendar days, whichever is the longer.

4. Where the evidence-protection measures have been revoked, or where they lapse due to any act or omission by the applicant, or where it is subsequently found that there has been no infringement or threat of infringement of any intellectual property right\(^{39}\), the judicial authorities shall have the authority to order the applicant, upon request of the defendant, to provide the defendant with appropriate compensation for any injury caused by these measures.

5. Member States may take measures to protect witnesses' identity.\(^{40}\)

\(^{39}\) NL : insert "or where it is subsequently found that the measures have been disproportionate in relation to the seriousness of the infringement".

\(^{40}\) F, FIN, P, S, DK, D, A, E, NL, : reservation on (5), it is a criminal law measure. But F, D, E could accept it in the context of a global compromise.
SECTION 3
RIGHT OF INFORMATION

Article 9
Right of information\textsuperscript{41} \textsuperscript{42}

1. Member States shall ensure that, [...] in appropriate cases, and in response to a justified and proportionate request of the claimant, the competent judicial authorities may order [...] that information on the origin and distribution networks of the goods or services which [...] infringe an intellectual property right [...] be provided by the infringer and/or any other person who:

(a) was found in possession of the infringing goods on a commercial scale;\textsuperscript{43} \textsuperscript{44}

(b) was found to be using the infringing services on a commercial scale;

(ba) was found to be providing on a commercial scale services used in infringing activities;\textsuperscript{45}
or

(c) was indicated by the person referred to in point (a), (b) or (ba) as being involved in the production, manufacture or distribution of the goods or the provision of the services.

\textsuperscript{41} S, E, A, P, DK, SL : render Article 9 optional. D : scrutiny reservation. COM opposed to an optional Article 9.

\textsuperscript{42} B proposed alternative drafting on Article 9 as in 6065/04/04 PI 18 CODEC 168. This proposal is supported by NL, D.

\textsuperscript{43} UK : reservation on "on a commercial scale" throughout Article 9.

\textsuperscript{44} F : add "and/or with a view to a direct or indirect economic interest" to points (a), (b) and (ba) of paragraph 1.

\textsuperscript{45} UK, D, NL : reservation on (1)(ba). P: scrutiny reservation.
2. The information referred to in paragraph 1 shall, as appropriate, comprise:

(a) the names and addresses of the producers, manufacturers, distributors, suppliers and other previous holders of the goods or services, as well as the intended wholesalers and retailers;

(b) information on the quantities produced, manufactured, delivered, received or ordered, as well as the price obtained for the goods or services in question.

3. Paragraphs 1 and 2 shall apply without prejudice to other statutory provisions which:

(a) grant the right holder rights to receive fuller information;

(b) govern the use in civil or criminal proceedings of the information communicated pursuant to this Article;

(c) govern responsibility for misuse of the right of information;

(d) afford an opportunity for refusing to provide information which would force the person referred to in paragraph 1 to admit to his own participation or that of his close relatives\(^46\) in an infringement of an intellectual property right; or

(e) govern the protection of confidentiality of information sources or the treatment of personal data.

(4) Deleted.

\(^{46}\) UK: reservation on "or that of his close relatives".
SECTION 4

PROVISIONAL MEASURES

Article 10

Provisional measures\(^{47}\)

1. Member States shall ensure that the judicial authorities may, at the request of the applicant:

(a) issue against the alleged infringer […] an interlocutory injunction intended to prevent any impending infringement of an intellectual property right, or to forbid, on a provisional basis and subject, where appropriate, to a recurring penalty payment where provided for by national law, the continuation of the alleged infringements of that right, or to make such continuation subject to the lodging of guarantees intended to ensure the compensation of the right holder; an interlocutory injunction may also be issued, under the same conditions, against an intermediary whose services are being used by a third party to infringe an industrial property right;

(b) order the seizure\(^{48}\) or delivery up of the goods suspected of infringing an intellectual property right so as to prevent their entry into or movement within the channels of commerce.

[...]

1a. In cases of infringement committed on a commercial scale,\(^{49}\) the Member States shall ensure that, if the injured party demonstrates circumstances likely to endanger the recovery of damages, the judicial authorities may order the precautionary seizure of the movable and immovable property of the alleged infringer, including the blocking of his bank accounts and other assets. To this end, the competent authorities may order the communication of bank, financial or commercial documents, or appropriate access to the relevant information.\(^{50}\)

\(^{47}\) B : scrutiny reservation on Article 10.

\(^{48}\) LUX, DK : reservation on "seizure".

\(^{49}\) F : reservation on "committed on a commercial scale".

\(^{50}\) LUX, E : reservation on last sentence of paragraph 1a.
1b. The judicial authorities shall, in respect of the measures referred to in paragraphs 1 and 1a, have the authority to require the applicant to provide any reasonably available evidence in order to satisfy themselves with a sufficient degree of certainty that the applicant is the right holder and that the applicant's right is being infringed, or that such infringement is imminent.

2. Member States shall ensure that the provisional measures referred to in paragraphs 1 and 1a may, in appropriate cases, be taken without the defendant having been heard, in particular when any delay would cause irreparable prejudice to the right holder. In the event of this happening, the parties shall be so informed without delay after the execution of the measures at the latest.

A review, including the right to be heard, shall take place upon request of the defendant with a view to deciding, within a reasonable time after notification of the measures, whether these measures shall be modified, revoked or confirmed.

3. Member States shall ensure that the provisional measures referred to in paragraphs 1 and 1a shall be revoked, or otherwise cease to have effect, upon request by the defendant, if the applicant does not institute proceedings leading to a decision on the merits of the case before the competent judicial authority within a reasonable period to be determined by the judicial authority ordering the measures where the Member State’s law so permits or, in the absence of such determination, within a period not to exceed 20 working days or 31 calendar days, whichever is the longer.

4. The competent judicial authorities may make the provisional measures referred to in paragraphs 1 and 1a subject to the lodging by the applicant of adequate security or equivalent assurance intended to ensure any compensation of the prejudice suffered by the defendant as provided for in paragraph 5.
5. Where the provisional measures are revoked or where they lapse due to any act or omission by the applicant, or where it is subsequently found that there has been no infringement or threat of infringement of an intellectual property right, the judicial authorities shall have the authority to order the applicant, upon request of the defendant, to provide the defendant with appropriate compensation for any injury caused by these measures.

Article 11
Precautionary measures
Deleted (merged with Article 10).

SECTION 5

MEASURES RESULTING FROM A DECISION ON THE MERITS OF THE CASE

Article 12
Corrective measures

Without prejudice to any damages due to the right holder by reason of the infringement, and without compensation of any sort, Member States shall ensure that the competent judicial authorities may order, at the request of the applicant, that appropriate measures be taken with regard to goods that they have found to be infringing an intellectual property right and, in appropriate cases, with regard to materials and implements principally used in the creation or manufacture of these goods. Such measures shall include:

51 NL: insert "or where it is subsequently found that the measures have been disproportionate in relation to the seriousness of the infringement".
52 UK: reservation on "Without prejudice to any damages due to the right holder by reason of the infringement".
(a) **recall** from the channels of commerce,
(b) **definitive removal** from the channels of commerce or
(c) **destruction**.

The judicial authorities shall order that these measures shall be carried out at the expense of the infringer, unless particular reasons are invoked for not doing so.

In considering a request for corrective measures, the need for proportionality between the seriousness of the infringement and the remedies ordered as well as the interests of third parties shall be taken into account.

*Article 13*

Disposal outside the channels of commerce

Deleted (merged with Article 12).

*Article 14*

Destruction of goods

Deleted (merged with Article 12).

*Article 15*

Injunctions

1. Member States shall ensure that, when a judicial decision has been taken finding an infringement of an intellectual property right, the judicial authorities may issue against the infringer [...] an injunction aimed at prohibiting the continuation of the infringement. Where provided for by national law, non-compliance with an injunction shall, where appropriate, be subject to a recurring penalty payment, with a view to ensuring compliance. An injunction may also be issued, under the same conditions, against an intermediary whose services are used by third parties to infringe an industrial property right.
2. Deleted (merged with paragraph 1)

*Article 16*

*Alternative measures*\(^{53}\)

Member States may provide that, in appropriate cases and at the request of the person liable to be subjected to the measures provided for in this Section, the competent judicial authorities may […] order pecuniary compensation to be paid to the injured party instead of applying the above measures if that person has acted unintentionally and without negligence\(^{54}\), if execution of the measures in question would cause him disproportionate harm and if pecuniary compensation to the injured party appears reasonably satisfactory.\(^{55}\)

[...]\(^{56}\)

**SECTION 6**

**DAMAGES AND LEGAL COSTS**

*Article 17*

**Damages**

1. Member States shall ensure that the competent judicial authorities, on application by the injured party, shall order the infringer who knowingly, or with reasonable grounds to know, engaged in an infringing activity, to pay the right holder damages appropriate to the actual prejudice suffered by him as a result of the infringement.

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\(^{53}\) F : reservation on Article 16. If maintained, is should be made conditional upon the agreement of the injured party. DK : scrutiny reservation.

\(^{54}\) S, E: reservation on "if that person has acted unintentionally and without negligence".

\(^{55}\) NL: doubts on the compatibility of this provision with TRIPS.

\(^{56}\) I, F : reservation on the deletion of the second subparagraph of Article 16.
When the judicial authorities set the damages, they shall take into account all appropriate aspects, such as the negative economic consequences, including lost profits, which the injured party has suffered, as well as any unfair profits made by the infringer and, in appropriate cases, […] elements other than economic factors, such as the moral prejudice caused to the right holder by the infringement.

As an alternative to the above, the judicial authorities may, in appropriate cases, set the damages as a lump sum on the basis of elements such as the amount of royalties or fees which would have been due if the infringer had requested authorisation to use the intellectual property right in question.

2. Deleted.

3. In cases where the infringer did not knowingly, or with reasonable grounds to know, engage in infringing activity, Member States may lay down that the judicial authorities may order the recovery of profits […] or the payment of damages which may or may not be pre-established.57

Article 18
Legal costs

Member States shall ensure that reasonable and proportionate legal costs […] and other expenses incurred by the successful party shall as a general rule be borne by the unsuccessful party. […]

57 UK scrutiny reservation on this Article.
SECTION 7

PUBLICITY MEASURES

Article 19

Publication of judicial decisions

Member States shall ensure that, in legal proceedings instituted for infringement of an intellectual property right, the judicial authorities may order, at the request of the applicant\textsuperscript{58} and at the expense of the infringer, appropriate measures for the dissemination of the information concerning the decision, including displaying the decision and publishing it in full or in part […].

Member States may provide for other additional publicity measures which are appropriate to the particular circumstances, including prominent advertising.

[CHAPTER III

OTHER SANCTIONS

Article 20

Other sanctions

1. Without prejudice to the civil and administrative measures and procedures laid down by this Directive, Member States may apply other appropriate sanctions in cases where intellectual property rights have been infringed.

2. to 4. Deleted.]\textsuperscript{59}

\textsuperscript{58} I : reservation on "at the request of the applicant".
\textsuperscript{59} A, I, F, D, UK, S, DK, P, NL, DIN : reservation on Article 20. COM insists on its own proposal for this Article.
CHAPTER IV
TECHNICAL MEASURES

Article 21
Legal protection of technical devices

Deleted

Article 22
Codes of conduct

1. Member States shall encourage:

(a) the development by trade or professional associations or organisations of codes of conduct at Community level aimed at contributing towards the enforcement of the intellectual property rights referred to in Article 2, particularly by recommending the use on optical discs of a source code enabling the identification of the origin of their manufacture;

(b) the submission to the Commission of draft codes of conduct at national and Community level and of any evaluations of the application of these codes of conduct.

2. Deleted
CHAPTER V
ADMINISTRATIVE COOPERATION

Article 23
Assessment

1. Three years after the date laid down in Article 25(1), each Member State shall submit to the Commission a report informing it of the situation with regard to implementation of this Directive.

On the basis of those reports, the Commission shall draw up a report on the application of this Directive, including an assessment of the effectiveness of the measures taken, […] as well as an evaluation of its impact on innovation and the development of the information society. That report shall be transmitted to the European Parliament, the Council and the European Economic and Social Committee. It shall be accompanied, if necessary, by proposals for amendments to this Directive.

2. Member States shall provide the Commission with all the aid and assistance it may need when drawing up the report referred to in the second subparagraph of paragraph 1.60

Article 24
Exchange of information and correspondents

[…]

For the purpose of promoting cooperation, including the exchange of information, among Member States and between Member States and the Commission, each Member State shall designate one or more national correspondents for any questions relating to the implementation of the measures provided for by this Directive. It shall communicate the details of the correspondents […] to the other Member States and to the Commission.

60 EL : reservation on Article 23.
CHAPTER VI
FINAL PROVISIONS

Article 25
Implementation

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by … [eighteen] [twenty-four][61] months after the date of adoption of this Directive] at the latest. They shall forthwith inform the Commission thereof.

   When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the text of the provisions of national law which they adopt in the field covered by this Directive.

Article 26
Entry into force

This Directive shall enter into force on the twentieth day following its publication in the Official Journal of the European Union.

Article 27
Addresses

This Directive is addressed to the Member States.

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[61] NL, UK, B, LUX, D, I, EL, CZ : request for 24 months. S needs more.
COUNCIL OF THE EUROPEAN UNION

Brussels, 9 February 2004

6065/04

LIMITE

PI 18
CODEC 168

TRANSLATION PROVIDED BY THE BELGIAN DELEGATION

WORKING DOCUMENT

from: Belgian delegation
to: Working Party on Intellectual Property

No. prev. doc.: 6052/04 PI 17 CODEC 166
No. Cion prop.: 6777/03 PI 19 CULT 17 CODEC 204

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
- Proposal for amending Article 9 in 5802/04

Delegations will find attached a proposal by the Belgian delegation which was distributed at the meeting of the Working Party on Intellectual Property on 5 and 6 February 2004.
SECTION 3

RIGHT OF INFORMATION

Article 9

Right of information

1. Member States shall ensure that, in the context of proceedings concerning an [...] infringement of an intellectual property right [...], the competent judicial authorities may order, in response to a [justified and proportionate] request of the right holder [...], in appropriate cases, the infringer to provide information on the origin of the infringing goods or services.

[...]

2. The information referred to in paragraph 1 may comprise:

(a) the names and addresses of the producers, manufacturers, distributors, suppliers and other previous holders of the goods or services, as well as the intended wholesalers and retailers;

(b) information on the quantities produced, manufactured, delivered, received or ordered, as well as the price obtained for the goods or services in question.

3. Paragraphs 1 and 2 shall apply without prejudice to other statutory provisions which:

(a) grant the right holder rights to receive fuller information;
(b) govern the use in civil or criminal proceedings of the information communicated pursuant to this Article;

(c) govern responsibility for misuse of the right of information;

(d) afford an opportunity for refusing to provide information which would force the person referred to in paragraph 1 to admit to his own participation or that of his close relatives in an infringement of an intellectual property right; or

(e) govern the protection of confidentiality of information sources or the treatment of personal data.

[...]

**Justification**

Revealing the source and the distribution network is an important aspect of combating piracy. Obtaining information on the origin, the production and the distributors, can be a particularly efficient means in this respect.

Given the possibly sensitive, confidential and commercial nature of this information, such right of information must be subject to the necessary caution and guarantees. For this reason, it seems essential that the right of information can only be exercised if a judicial authority has found that an infringement was committed.

Concerning the extent of the information which can be ordered, the appropriate flexibility has to be left to the judicial authority. In this way the judicial authority can in an appropriate manner take account of all circumstances of the case, as e.g. the seriousness of the infringement.
The possibility for the responsible administrative authorities to provide to the right holder the information concerned is deleted, since the infringement has to be established first, and administrative authorities cannot establish this infringement. It would also cause to high a work charge for the administrative authorities.

________________________
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\(^1\). 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.\(^2\)

\(^{1}\) On the application of Article 65 EC, see Opinion of the Legal Service, Doc. 7862/02 of 17.04.02.
COUNCIL OF
THE EUROPEAN UNION

Brussels, 16 February 2004

6376/04

Interinstitutional File:
2003/0024 (COD)

PI 21
CODEC 219

NOTE

from: Presidency
to: Permanent Representatives Committee (Part 1)

No. prev. doc.: 6052/04 PI 17 CODEC 166
No. Cion prop.: 6777/03 PI 19 CULT 17 CODEC 204

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
- Text agreed by the Permanent Representatives Committee

Delegations will find attached the text of the above proposal for a Directive as agreed by the Permanent Representatives Committee following its meeting on 11 and 13 February 2004 with a view to reaching agreement with the European Parliament at first reading.
Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on measures and procedures to ensure the enforcement of intellectual property rights

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,
Having regard to the Treaty establishing the European Community, and in particular Article 95 thereof,
Having regard to the proposal from the Commission¹,
Having regard to the opinion of the European Economic and Social Committee²,
Having regard to the opinion of the Committee of the Regions³,
Acting in accordance with the procedure laid down in Article 251 of the Treaty⁴,
Whereas:

(1) The achievement of the Internal Market entails eliminating restrictions on freedom of movement and distortions of competition, while creating an environment conducive to innovation and investment. In this context, the protection of intellectual property is an essential element for the success of the Internal Market. The protection of intellectual property is important not only for promoting innovation and creativity, but also for developing employment and improving competitiveness.

(2) The protection of intellectual property must allow the inventor or creator to derive a legitimate profit from his invention or creation. It must also allow the widest possible dissemination of works, ideas and new know-how. At the same time, the protection of intellectual property must not hamper freedom of expression or the free movement of information, or the protection of personal data, including on the Internet.

¹ OJ C […], […], p.[…].
² OJ C […], […], p.[…].
³ OJ C […], […], p.[…].
⁴ OJ C […], […], p.[…].
(3) However, without effective means of enforcing intellectual property, innovation and creativity are discouraged and investment diminished. It is therefore necessary to ensure that the substantive law on intellectual property, which is nowadays largely part of the acquis communautaire, is applied effectively in the Community. In this respect, the means of enforcing intellectual property rights are of paramount importance for the success of the single market.

(4) At international level, all Member States, as well as the Community itself as regards matters within its competence, are bound by the Agreement on Trade-Related Aspects of Intellectual Property (the "TRIPS Agreement"), approved, as part of the multilateral negotiations of the Uruguay Round, by Council Decision 94/800/EC¹ concluded in the framework of the World Trade Organisation.

(5) The TRIPS Agreement contains, in particular, provisions on the means of enforcing intellectual property rights which are common standards applicable at international level and implemented in all Member States. The provisions of this Directive should not affect Member States’ international obligations, including those under the TRIPS Agreement.

(6) There are also international conventions to which all Member States are parties and which also contain provisions on the means of enforcing intellectual property rights. These include, in particular, the Paris Convention for the Protection of Industrial Property, the Berne Convention for the Protection of Literary and Artistic Works, and the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations.

(7) It emerges from the consultations held by the Commission on this question that, in the Member States, and despite the provisions of the TRIPS Agreement, there are still major disparities as regards the means of enforcing intellectual property rights. For instance, the arrangements for applying provisional measures, which are used in particular to safeguard evidence, the calculation of damages, or the arrangements for applying injunctions, vary widely from one Member State to another. In some Member States, there are no measures and procedures such as the right of information and the recall, at the infringer's expense, of the infringing goods placed on the market.

(8) The disparities between the systems of the Member States for enforcing intellectual property rights are prejudicial to the proper functioning of the Internal Market and make it impossible to ensure that intellectual property rights enjoy an equivalent level of protection throughout the Community. This situation does not promote free movement within the Internal Market nor create an environment conducive to healthy competition.

(9) The current disparities also lead to a weakening of the substantive law on intellectual property and to a fragmentation of the Internal Market in this field. This causes a loss of confidence in the Internal Market in business circles, with a consequent reduction in investment in innovation and creation. Infringements appear to be increasingly linked to organised crime. Increasing use of the Internet enables pirated products to be distributed instantly around the globe. Effective enforcement of the substantive law on intellectual property, which is nowadays largely part of the acquis communautaire, must be ensured by specific action at Community level. Approximation of the legislation of the Member States in this field is therefore an essential prerequisite for the implementation of the Internal Market.

(10) The objective of this Directive is to approximate legislative systems so as to ensure a high, equivalent and homogeneous level of protection in the Internal Market.

(11) This Directive does not aim to establish harmonised rules for judicial cooperation, jurisdiction, the recognition and enforcement of decisions in civil and commercial matters, nor to deal with applicable law. There are Community instruments which govern such matters in general terms and are, in principle, equally applicable to intellectual property.

(12) This Directive should not affect the application of the rules of competition, and in particular Articles 81 and 82 of the Treaty. The measures provided for in this Directive should not be used to unduly restrict competition in a manner which is contrary to the Treaty.
(13) It is necessary to define the scope of this Directive as widely as possible in order to encompass all the intellectual property rights covered by Community provisions in this field and/or by the national law of the Member State concerned. Nevertheless, that requirement does not affect the possibility, on the part of those Member States which so wish, to extend, for internal purposes, the provisions of this Directive to include acts involving unfair competition, including parasitic copies, or similar activities.

(13a) The measures provided for in Articles 7(2), 9(1) and 10(1a) of this Directive need to be applied only in respect of acts committed on a commercial scale. This is without prejudice to the possibility for Member States to apply these measures also in respect of other acts. The acts which are committed on a commercial scale are those carried out for direct or indirect economic or commercial advantage; this would normally exclude acts done by end consumers acting in good faith.


(15) The provisions of this Directive are without prejudice to the particular provisions for the enforcement of rights and on exceptions in the domain of copyright and related rights set out in Community instruments and notably those found in Council Directive 91/250/EEC of

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\(^1\) OJ L 281, 23.11.1995, p. 31.
14 May 1991 on the legal protection of computer programs\textsuperscript{1} or Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society\textsuperscript{2}.

(16) The measures and remedies provided for in this Directive should be determined in each case in such a manner as to take due account of the specific characteristics of that case, including the specific features of each intellectual property right and, where appropriate, the intentional or unintentional character of the infringement.

(17) The persons entitled to request application of these measures and procedures should be not only the right holders but also persons who have a direct interest and legal standing in so far as permitted by and in accordance with the applicable law, which may include professional organisations in charge of the management of those rights or for the defence of the collective and individual interests for which they are responsible.

(18) Since copyright exists from the creation of a work and does not require formal registration, it is appropriate to adopt the rule in Article 15 of the Berne Convention, which establishes the presumption whereby the author of a literary or artistic work is regarded as such if his name appears on the work. A similar presumption should be applied to the owners of related rights since often it is the holder of a related right, such as a phonogram producer, who will seek to defend rights and engage in fighting acts of piracy.

(19) Given that evidence is an element of paramount importance for establishing the infringement of intellectual property rights, it is appropriate to ensure that effective means of presenting, obtaining and protecting evidence are available. The procedures must have regard to the rights of the defence and must provide the necessary guarantees including the protection of confidential information. For infringements carried out on a commercial scale it is also important that the courts may order access, where appropriate, to banking, financial or commercial documents under the control of the alleged infringer.

\textsuperscript{1} OJ L 122, 17.5.1991, p. 42.

\textsuperscript{2} OJ L 167, 22.6.2001, p. 10.
(20) Deleted.

(21) Other measures designed to ensure a high level of protection exist in certain countries and must be made available in all the Member States. This is the case with the right of information, which allows precise information to be obtained on the origin of the infringing goods or services, the distribution channels and the identity of the third parties involved in the infringement.

(22) It is also essential to provide for provisional measures allowing for the immediate termination of the infringement without awaiting a decision on the substance of the case, while observing the rights of the defence, ensuring the proportionality of the provisional measures as appropriate to the characteristics of the case in question and providing the guarantees needed to cover the costs and the injury caused to the defendant by an unjustified request. Such measures are particularly justified when any delay would cause irreparable prejudice to the holder of an intellectual property right.

(22a) Without prejudice to any other measures and remedies available, rightholders should have the possibility of applying for an injunction against an intermediary whose services are being used by a third party to infringe the rightholder's industrial property right. The conditions and modalities relating to such injunctions should be left to the national law of the Member States. As far as infringements of copyright and related rights are concerned, a comprehensive level of harmonisation is already provided for in Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society. The provision of Article 8, paragraph 3 of Directive 2001/29/EC should therefore not be affected by this Directive.

(23) Depending on the particular case, and if justified by circumstances, the measures and procedures to be provided for should include prohibitory measures aimed at preventing further infringements of intellectual property rights. Moreover there should be corrective measures, where appropriate at the expense of the infringer, such as the recall, the removal
definitively from the channels of commerce, or destruction of the infringing goods and in appropriate cases the materials and implements principally used in the creation or manufacture of these goods. These corrective measures should take account of the interests of third parties including, in particular, consumers and private parties acting in good faith.

(23a) Member States should have the option of providing, in cases where an infringement has been carried out unintentionally and without negligence and where the corrective measures or injunctions provided for by this Directive would be disproportionate, for the possibility, in appropriate cases, of pecuniary compensation being awarded to the injured party as an alternative measure. However, where the commercial use of counterfeit goods or the supply of services would constitute an infringement of law other than intellectual property law or would be likely to harm consumers, such use or supply should remain prohibited.

(24) With a view to compensating for the prejudice suffered as a result of an infringement committed by an infringer who has engaged in an activity in the knowledge, or with reasonable grounds for knowing, that it would give rise to such an infringement, the amount of damages awarded to the right holder should take account of all appropriate aspects, such as loss of earnings incurred by the right holder, or unfair profits made by the infringer and, where appropriate, any moral prejudice caused to the right holder. As an alternative, for example where it would be difficult to determine the amount of the actual prejudice suffered, the amount of the damages might be derived from elements such as the royalties or fees which would have been due if the infringer had requested authorisation to use the intellectual property right in question (the aim being not to introduce an obligation to provide for punitive damages but to allow for compensation based on an objective criterion while taking account of the expenses incurred by the right holder, such as the costs of identification and research).

(24a) To act as a supplementary deterrent to future infringers and contribute to the awareness of the public at large, it is useful to publicise judgments in intellectual property infringement cases.
In addition to the civil and administrative measures and procedures provided for under this Directive, criminal sanctions also constitute, in appropriate cases, a means of ensuring the enforcement of intellectual property rights.

Deleted.

Industry must take an active part in the fight against piracy and counterfeiting. The development of codes of conduct in the circles directly affected is a supplementary means of bolstering the regulatory framework. The Member States, in collaboration with the Commission, should encourage the development of codes of conduct in general. Monitoring of the manufacture of optical discs, particularly by means of an identification code embedded in discs produced on the territory of the Community, helps to limit infringements of intellectual property in this sector which suffers from piracy on a large scale. However, these technical protection measures must not be misused with a view to protecting markets and preventing parallel imports.

In order to facilitate the uniform application of the provisions set out in this Directive, it is appropriate to provide for cooperation and the exchange of information between Member States, on the one hand, and between the Member States and the Commission on the other, in particular by creating a network of correspondents designated by the Member States and by providing regular reports assessing the application of this Directive and the effectiveness of the measures taken by the various national bodies.

Since, for the reasons already described, the objectives of this Directive can best be achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality as set out in that Article, this Directive does not go beyond what is necessary in order to achieve its objectives.

This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular, this Directive seeks to ensure full respect for intellectual property (Article 17(2) of the Charter of Fundamental Rights of the European Union),
HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I

OBJECTIVE AND SCOPE

Article 1

Subject-matter

This Directive concerns the measures and procedures necessary to ensure the enforcement of intellectual property rights. For the purposes of this Directive, the term "intellectual property rights" includes industrial property rights.

Article 2

Scope

1. Without prejudice to the means which are or may be provided for in Community or national legislation, in so far as those means may be more favourable for right holders, the measures and procedures provided for by this Directive shall apply, in accordance with Article 3, to any infringement of intellectual property rights as provided for by Community law and/or by the national law of the Member State concerned.

2. This Directive shall be without prejudice to the particular provisions on the enforcement of rights and on exceptions contained in Community legislation concerning copyright and rights related to copyright, notably those found in Directive 91/250/EEC and, in particular, Article 7 of that Directive, or Directive 2001/29/EC and, in particular, Articles 2 to 6 and Article 8 of that Directive.
3. This Directive shall not affect:

(a) the Community provisions governing the substantive law on intellectual property, Directive 95/46/EC, Directive 1999/93/EC or Directive 2000/31/EC in general, and the provisions of Articles 12 to 15 in particular of that Directive;

(b) Member States’ international obligations and notably the Agreement on Trade-Related Aspects of Intellectual Property Rights (the “TRIPS Agreement”), including those relating to criminal procedures and penalties;

(c) any national provisions in Member States relating to criminal procedures or penalties in respect of infringement of intellectual property rights.
CHAPTER II
MEASURES AND PROCEDURES

SECTION 1
GENERAL PROVISIONS

Article 3
General obligation

Member States shall provide for the measures, procedures and remedies needed to ensure the enforcement of the intellectual property rights covered by this Directive. These measures, procedures and remedies shall be fair and equitable, and shall not be unnecessarily complicated or costly, nor entail unreasonable time-limits or unwarranted delays.

The measures and remedies shall also be effective, proportionate and dissuasive and shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.

Article 4
Penalties

Merged with Article 3.
Article 5

Persons entitled to apply for the application of the measures and procedures

Member States shall recognise as persons entitled to seek application of the measures and procedures referred to in this Chapter:

- the holders of intellectual property rights in accordance with the provisions of the applicable law,

- all other persons authorised to use those rights, in particular licensees, in so far as permitted by and in accordance with the provisions of the applicable law,

- intellectual property collective rights management bodies which are regularly recognised as having a right to represent holders of intellectual property rights, in so far as permitted by and in accordance with the applicable law,

- professional defence bodies which are regularly recognised as having a right to represent holders of intellectual property rights, in so far as permitted by and in accordance with the applicable law.
**Article 6**

**Presumption of authorship or ownership**

For the purposes of applying the measures and procedures provided for in this Directive,

(a) in order that the author of a literary or artistic work, in the absence of proof to the contrary, be regarded as such, and consequently be entitled to institute infringement proceedings, it shall be sufficient for his name to appear on the work in the usual manner;

(b) the provision under (a) shall apply mutatis mutandis to the holders of rights related to copyright with regard to their protected subject matter.

**SECTION 2**

**EVIDENCE**

**Article 7**

**Evidence**

1. Member States shall ensure that, on application by a party which has presented reasonably available evidence sufficient to support its claims, and has, in substantiating those claims, specified evidence which lies in the control of the opposing party, the competent judicial authorities may order that such evidence be produced by the opposing party, subject to the protection of confidential information. For the purposes of this paragraph, Member States may provide that a reasonable sample of a substantial number of copies of a work or any other protected object be considered by the competent judicial authorities to constitute reasonable evidence.
2. Under the same conditions, in the case of an infringement carried out on a commercial scale, Member States shall take such measures as are necessary to enable the competent judicial authorities to order, where appropriate, on application by a party, the communication of banking, financial or commercial documents under the control of the opposing party, subject to the protection of confidential information.

Article 8

Measures for protecting evidence

1. Member States shall ensure that even before the commencement of proceedings on the merits of the case the competent judicial authorities may, on application by a party who has presented reasonably available evidence to support his claims that his intellectual property right has been infringed or is about to be infringed, order prompt and effective provisional measures to preserve relevant evidence in regard to the alleged infringement, subject to the protection of confidential information. Such measures may include the detailed description, with or without the taking of samples, or the physical seizure of the infringing goods, and, in appropriate cases, the materials and implements used in the production and/or distribution of these goods and the documents relating thereto. These measures shall be taken, if necessary without the other party having been heard, in particular where any delay is likely to cause irreparable harm to the right holder, or where there is a demonstrable risk of evidence being destroyed.

Where evidence-protection measures have been adopted without the other party having been heard, the affected parties shall be given notice immediately after the execution of the measures at the latest. A review, including a right to be heard, shall take place upon request of the affected parties with a view to deciding, within a reasonable period after the notification of the measures, whether the measures shall be modified, revoked or confirmed.
2. Member States shall ensure that the evidence-protection measures may be subject to the applicant’s lodging of an adequate security or equivalent assurance intended to ensure compensation for any prejudice suffered by the defendant as provided for in paragraph 4.

3. Member States shall ensure that the evidence-protection measures shall be revoked or otherwise cease to have effect upon request by the defendant, without prejudice to the damages which may be claimed, if the applicant has not instituted legal proceedings leading to a decision on the merits of the case before the competent judicial authority within a reasonable period, to be determined by the judicial authority ordering the measures when the law of a Member State so permits or, in the absence of such determination, within a period not to exceed 20 working days or 31 calendar days, whichever is the longer.

4. Where the evidence-protection measures have been revoked, or where they lapse due to any act or omission by the applicant, or where it is subsequently found that there has been no infringement or threat of infringement of any intellectual property right, the judicial authorities shall have the authority to order the applicant, upon request of the defendant, to provide the defendant with appropriate compensation for any injury caused by these measures.

5. Member States may take measures to protect witnesses' identity.
SECTION 3
RIGHT OF INFORMATION

Article 9
Right of information

1. Member States shall ensure that, in the context of proceedings concerning an infringement of an intellectual property right and in response to a justified and proportionate request of the claimant, the competent judicial authorities may order that information on the origin and distribution networks of the goods or services which infringe an intellectual property right be provided by the infringer and/or any other person who:

(a) was found in possession of the infringing goods on a commercial scale;

(b) was found to be using the infringing services on a commercial scale;

(ba) was found to be providing on a commercial scale services used in infringing activities; or

(c) was indicated by the person referred to in point (a), (b) or (ba) as being involved in the production, manufacture or distribution of the goods or the provision of the services.

2. The information referred to in paragraph 1 shall, as appropriate, comprise:

(a) the names and addresses of the producers, manufacturers, distributors, suppliers and other previous holders of the goods or services, as well as the intended wholesalers and retailers;
(b) information on the quantities produced, manufactured, delivered, received or ordered, as well as the price obtained for the goods or services in question.

3. Paragraphs 1 and 2 shall apply without prejudice to other statutory provisions which:

(a) grant the right holder rights to receive fuller information;

(b) govern the use in civil or criminal proceedings of the information communicated pursuant to this Article;

(c) govern responsibility for misuse of the right of information;

(d) afford an opportunity for refusing to provide information which would force the person referred to in paragraph 1 to admit to his own participation or that of his close relatives in an infringement of an intellectual property right; or

(e) govern the protection of confidentiality of information sources or the treatment of personal data.

(4) Deleted.
SECTION 4

PROVISIONAL MEASURES

Article 10

Provisional measures

1. Member States shall ensure that the judicial authorities may, at the request of the applicant:

(a) issue against the alleged infringer an interlocutory injunction intended to prevent any impending infringement of an intellectual property right, or to forbid, on a provisional basis and subject, where appropriate, to a recurring penalty payment where provided for by national law, the continuation of the alleged infringements of that right, or to make such continuation subject to the lodging of guarantees intended to ensure the compensation of the right holder; an interlocutory injunction may also be issued, under the same conditions, against an intermediary whose services are being used by a third party to infringe an intellectual property right; injunctions against intermediaries whose services are used by a third party to infringe a copyright or a related right are covered by Directive 2001/29/EC;

(b) order the seizure or delivery up of the goods suspected of infringing an intellectual property right so as to prevent their entry into or movement within the channels of commerce.

1a. In cases of infringement committed on a commercial scale, the Member States shall ensure that, if the injured party demonstrates circumstances likely to endanger the recovery of damages, the judicial authorities may order the precautionary seizure of the movable and immovable property of the alleged infringer, including the blocking of his bank accounts and other assets. To this end, the competent authorities may order the communication of bank, financial or commercial documents, or appropriate access to the relevant information.
1b. The judicial authorities shall, in respect of the measures referred to in paragraphs 1 and 1a, have the authority to require the applicant to provide any reasonably available evidence in order to satisfy themselves with a sufficient degree of certainty that the applicant is the right holder and that the applicant's right is being infringed, or that such infringement is imminent.

2. Member States shall ensure that the provisional measures referred to in paragraphs 1 and 1a may, in appropriate cases, be taken without the defendant having been heard, in particular when any delay would cause irreparable prejudice to the right holder. In the event of this happening, the parties shall be so informed without delay after the execution of the measures at the latest.

A review, including the right to be heard, shall take place upon request of the defendant with a view to deciding, within a reasonable time after notification of the measures, whether these measures shall be modified, revoked or confirmed.

3. Member States shall ensure that the provisional measures referred to in paragraphs 1 and 1a shall be revoked, or otherwise cease to have effect, upon request by the defendant, if the applicant does not institute proceedings leading to a decision on the merits of the case before the competent judicial authority within a reasonable period to be determined by the judicial authority ordering the measures where the Member State's law so permits or, in the absence of such determination, within a period not to exceed 20 working days or 31 calendar days, whichever is the longer.

4. The competent judicial authorities may make the provisional measures referred to in paragraphs 1 and 1a subject to the lodging by the applicant of adequate security or equivalent assurance intended to ensure any compensation of the prejudice suffered by the defendant as provided for in paragraph 5.
5. Where the provisional measures are revoked or where they lapse due to any act or omission by the applicant, or where it is subsequently found that there has been no infringement or threat of infringement of an intellectual property right, the judicial authorities shall have the authority to order the applicant, upon request of the defendant, to provide the defendant with appropriate compensation for any injury caused by these measures.

Article 11
Precautionary measures
Deleted (merged with Article 10).

SECTION 5
MEASURES RESULTING FROM A DECISION ON THE MERITS OF THE CASE

Article 12
Corrective measures

Without prejudice to any damages due to the right holder by reason of the infringement, and without compensation of any sort, Member States shall ensure that the competent judicial authorities may order, at the request of the applicant, that appropriate measures be taken with regard to goods that they have found to be infringing an intellectual property right and, in appropriate cases, with regard to materials and implements principally used in the creation or manufacture of these goods. Such measures shall include:

(a) recall from the channels of commerce,
(b) definitive removal from the channels of commerce or
(c) destruction.
The judicial authorities shall order that these measures shall be carried out at the expense of the infringer, unless particular reasons are invoked for not doing so.

In considering a request for corrective measures, the need for proportionality between the seriousness of the infringement and the remedies ordered as well as the interests of third parties shall be taken into account.

**Article 13**

**Disposal outside the channels of commerce**

Deleted (merged with Article 12).

**Article 14**

**Destruction of goods**

Deleted (merged with Article 12).

**Article 15**

**Injunctions**

Member States shall ensure that, when a judicial decision has been taken finding an infringement of an intellectual property right, the judicial authorities may issue against the infringer an injunction aimed at prohibiting the continuation of the infringement. Where provided for by national law, non-compliance with an injunction shall, where appropriate, be subject to a recurring penalty payment, with a view to ensuring compliance.

Member States shall also ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe an intellectual property right, without prejudice to Article 8(3) of Directive 2001/29/EC.
Article 16
Alternative measures

Member States may provide that, in appropriate cases and at the request of the person liable to be subjected to the measures provided for in this Section, the competent judicial authorities may order pecuniary compensation to be paid to the injured party instead of applying the above measures if that person has acted unintentionally and without negligence, if execution of the measures in question would cause him disproportionate harm and if pecuniary compensation to the injured party appears reasonably satisfactory.

SECTION 6
DAMAGES AND LEGAL COSTS

Article 17
Damages

1. Member States shall ensure that the competent judicial authorities, on application by the injured party, shall order the infringer who knowingly, or with reasonable grounds to know, engaged in an infringing activity, to pay the right holder damages appropriate to the actual prejudice suffered by him as a result of the infringement.

When the judicial authorities set the damages:

a) they shall take into account all appropriate aspects, such as the negative economic consequences, including lost profits, which the injured party has suffered, any unfair profits made by the infringer and, in appropriate cases, elements other than economic factors, such as the moral prejudice caused to the right holder by the infringement;
b) as an alternative to (a), they may, in appropriate cases, set the damages as a lump sum on the basis of elements such as at least the amount of royalties or fees which would have been due if the infringer had requested authorisation to use the intellectual property right in question.

2. Deleted.

3. In cases where the infringer did not knowingly, or with reasonable grounds to know, engage in infringing activity, Member States may lay down that the judicial authorities may order the recovery of profits or the payment of damages which may be pre-established.

Article 18

Legal costs

Member States shall ensure that reasonable and proportionate legal costs and other expenses incurred by the successful party shall as a general rule be borne by the unsuccessful party, unless equity does not allow this.

SECTION 7

PUBLICITY MEASURES

Article 19

Publication of judicial decisions

Member States shall ensure that, in legal proceedings instituted for infringement of an intellectual property right, the judicial authorities may order, at the request of the applicant and at the expense of the infringer, appropriate measures for the dissemination of the information concerning the decision, including displaying the decision and publishing it in full or in part.

Member States may provide for other additional publicity measures which are appropriate to the particular circumstances, including prominent advertising.
CHAPTER III
SANCTIONS BY MEMBER STATES

Article 20
Sanctions by Member States

Without prejudice to the civil and administrative measures and procedures laid down by this Directive, Member States may apply other appropriate sanctions in cases where intellectual property rights have been infringed.

CHAPTER IV
TECHNICAL MEASURES

Article 21
Legal protection of technical devices

Deleted

Article 22
Codes of conduct

1. Member States shall encourage:
   (a) the development by trade or professional associations or organisations of codes of conduct at Community level aimed at contributing towards the enforcement of the intellectual property rights referred to in Article 2, particularly by recommending the use on optical discs of a source code enabling the identification of the origin of their manufacture;
   (b) the submission to the Commission of draft codes of conduct at national and Community level and of any evaluations of the application of these codes of conduct.

2. Deleted
CHAPTER V

ADMINISTRATIVE COOPERATION

Article 23

Assessment

1. Three years after the date laid down in Article 25(1), each Member State shall submit to the Commission a report informing it of the situation with regard to implementation of this Directive.

On the basis of those reports, the Commission shall draw up a report on the application of this Directive, including an assessment of the effectiveness of the measures taken, as well as an evaluation of its impact on innovation and the development of the information society. That report shall be transmitted to the European Parliament, the Council and the European Economic and Social Committee. It shall be accompanied, if necessary, and in the light of developments in the Community legal order, by proposals for amendments to this Directive.

2. Member States shall provide the Commission with all the aid and assistance it may need when drawing up the report referred to in the second subparagraph of paragraph 1.

Article 24

Exchange of information and correspondents

For the purpose of promoting cooperation, including the exchange of information, among Member States and between Member States and the Commission, each Member State shall designate one or more national correspondents for any questions relating to the implementation of the measures provided for by this Directive. It shall communicate the details of the correspondents to the other Member States and to the Commission.
CHAPTER VI
FINAL PROVISIONS

Article 25
Implementation

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by … [twenty-four months after the date of adoption of this Directive] at the latest. They shall forthwith inform the Commission thereof.

When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the text of the provisions of national law which they adopt in the field covered by this Directive.

Article 26
Entry into force

This Directive shall enter into force on the twentieth day following its publication in the Official Journal of the European Union.

Article 27
Addressees

This Directive is addressed to the Member States.
Debates
Tuesday, 9 March 2004 - Strasbourg

Opening of the session


Official feed and food controls


Byrne, Commission. Mr President, firstly I would like to express my thanks for all the hard work that has been done by members of the committees concerned with the proposal for a regulation on official feed and food controls. I acknowledge in particular the admirable efforts made by Mrs Paulsen on this
important initiative.

The Commission's proposal establishes rules on the organisation of official controls on feed, food and live animals to be respected by the Member States and it defines the tasks of the Commission's Food and Veterinary Office. It takes into account the principles of a risk-based approach to a comprehensive and integrated food and feed chain from farm to fork, including controls within the Community as well as controls on feed and food imported from third countries. It streamlines the primary responsibility for food and feed safety at the level of the business operators and it strengthens the role of the competent authorities through stricter enforcement mechanisms within the existing control systems.

Above all the proposal aims to improve the efficiency of controls undertaken by both the Member States and the Commission. It defines tougher enforcement measures. It also creates a framework to support developing countries in meeting important requirements and provides for a financial framework to organise activities that enhance food and feed safety.

I underline in particular Mrs Paulsen's strenuous efforts to adopt the proposal at first reading. I share the very same aim and hope that it succeeds. Cooperation between the three institutions on this proposal has been excellent and again much of this is due to Mrs Paulsen, the driving force in bringing the three institutions together.

The Council and the majority of the European Parliament are now taking a convergent view on this text, which I am glad to accept in its entirety.

(Applause)

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> Klaß (PPE-DE ), – (DE) Mr President, I would like to mention that I have only just received the amendments in my own language – and there are 229 of them. I would therefore like to ask for more time so that I, and everyone else, can work through them, and to ask you to postpone the vote until tomorrow.

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> President. Mrs Klass, this is not the right time to make this request, not least because any request of this type will be put to the vote and submitted for decision in plenary. Such requests cannot be made at every stage in our work. You will, therefore, be able to put forward this request before the vote.

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> Paulsen (ELDR ), rapporteur. (SV) Mr President, Commissioner, ladies and gentlemen, it is of course hard to try to bring about an agreement at first reading. Will, knowledge and cooperation are required. I wish to thank all those of my fellow MEPs who have contributed their opposition to, and support for,
this process. It has been hard, but it has been extremely constructive.

I shall address some of the aspects that are most important to me about the proposal. One such aspect is its scope. I am exceptionally fortunate that the inspections now extend to include animal health and welfare. That probably constitutes Parliament’s greatest success in this hugely sensitive area about which the electorates in all our countries are extremely concerned. Another aspect is the transport of animals through Europe, and it is important that this is at least included in the control programme.

Parliament has also contributed the control of labelling while the inspections are under way. The Member States’ own control programmes must state that the inspectors’ tasks include that of checking that the labelling on food packets is correct, that it complies with the rules and that the contents and declaration of contents do in actual fact correspond with each other. That is a crucially important point for us as normal consumers when, on an ordinary Thursday afternoon, we are to do a bit of quick shopping for the evening meal. The fact that the whole chain is to be included – right from the field to the shop, dining room and restaurant – is the principle that of course permeates the whole of the food safety legislation.

Another aspect, about which I am both disappointed and pleased, is transparency. A clear majority of the committee demanded a name, shame and fame system. It was not possible to implement this because the Member States invoked legal and constitutional reasons why it should not be. As a Liberal, I perhaps eventually realised that it is probably not the state’s and the authorities’ task to say that the one producer is good and the other bad. With the system of transparency that now exists in this regulation, we have handed over this name, shame and fame function to civil society. A consumer group, animal protection group or local media organisation will be able to request the inspection reports and thus be responsible for this function, telling people how things appear behind the scenes.

The funding of duties is a very controversial issue – not between the Commission, the Council and myself but within Parliament. Some people want to see a permanently fixed duty, which is set in stone and the same for everyone. That would perhaps be very good, but it has been tried and has failed. Not all countries within the EU are exactly alike. The same basic conditions do not apply from Portugal to Finland or from Ireland to Hungary. I do, however, think that the proposal now before us is nicely balanced. Duties are to be collected, but it is clearly defined which duties are to be included. Special account is also to be taken of small, traditional companies, something I think is very important. It is important for us in the European Parliament to protect the small producers of unusual products that are the essence of Europe’s cultural heritage in the area of food. We must defend them and give them a chance. They must not be exempted from the thinking about safety, but less harsh duties might in actual fact be imposed upon them in the context of this control.
I would appeal to you all firstly to vote today despite all the problems that exist and, secondly, to fall in with my compromise vote list. Finally, I wish again to extend my many thanks to the Commission and the Council and, above all, to the Italian and Irish Presidencies. Thank you very much for your fantastic cooperation.

President. Since you too, Mrs Paulson, referred to the hope that the vote will have a positive outcome, I would repeat that, as regards whether or not to decide on the vote – referring to the speech made before by Mrs Klass – there will, if necessary, be a vote in plenary to decide whether or not to accept the adjournment of this vote.

Parish (PPE-DE), draftsman of the opinion of the Committee on Agriculture and Rural Development. – Mr President, I am speaking on behalf of Mrs Doyle, who is unable to be here this morning.

We welcome the feed and food controls in order to ensure healthy animals and good meat for people throughout Europe. However, we must give the industry time to develop a uniform approach across Europe. I would like Commissioner Byrne to explain in more detail how we are going to enforce the same kind of controls on feed imported into the European Union. It is very important that the same stringent controls are applied not only to our feed in Europe but also to imported feed.

Animal welfare is also extremely important. Mrs Paulsen mentioned labelling. We have to ensure that consumers can tell from the labelling which products have met those high animal welfare standards in Europe. Consumers should also be able to see from the labelling which products have not met those high standards.

The cost of inspection within the EU and fees charged to each feed company have to be looked at, because if one country is charging significantly more for inspections than another, it causes distortions throughout the single market. In broad terms, we must welcome these controls, but we have to be careful that we do not over-regulate.

Klaß (PPE-DE). – (DE) Mr President, I am speaking this morning on behalf of my colleague Mr Schnellhardt, who unfortunately cannot be with us. The regulation on feed and food controls before us is one of the EU measures to improve food safety. There is a common thread running through all the arrangements in this area, and that thread is the principle of universal controls, from the farm to the shop counter to the table. The participation of stakeholders in the food sector in food safety has been extended, responsibility has been clearly defined, and official controls have been shaped on a more scientific basis and clearly structured. This regulation on feed and food controls represents a
piece of framework legislation in this context.

It has to be said, unfortunately, that the treatment given to this regulation in this House is not in line with the usual parliamentary procedures. The text to be voted on today was largely worked out in the European Council and is significantly different from the Commission proposal. It has not been possible to consider and discuss the text before us in depth. We in this House have been endeavouring for years to extend our powers in relation to the legislative process. The procedure adopted for this regulation runs very much counter to those attempts.

Although we welcome the inclusion of animal welfare in this regulation, we are critical of the nature of the provisions relating to it. The regulation very much opens up the way to transferring certain official control activities to third parties. I believe, however, that official control activities, if their independence is to be ensured, should be engaged in by state institutions.

The same applies to the proposed financing procedure. The proposal will of course provide a uniform basis for calculating the fees for inspections in Europe, but it does nothing to eliminate the distortion in competition resulting from enormous differences in the level of fees, something that has been criticised for years. Just the opposite, in fact: this approach makes it quite possible that companies in the same administrative district will have to pay different fees because of their different geographical distance from the administrative authorities. Yet official controls are intended to promote health and should therefore be charged at approximately the same level for all companies involved.

The inadequate reference to national control plans and to the financing of ad hoc controls means that this procedural approach exposes companies to financial risk.

Lastly, I would like to specifically emphasise that we support many of the ideas put forward here. However, the unconventional way of producing the legislative text that has been imposed upon us, with new drafts repeatedly being published at short intervals, and with the final version of the amendments only becoming available in our own languages this morning, has unfortunately made in-depth consideration of the text impossible. It cannot be ruled out that possible shortcomings and critical points will go unnoticed because of this haste. For this reason, our unreserved support cannot be taken for granted.

Van den Berg (PSE ). – (NL) Mr President, I am speaking today on behalf of Mrs Corbey, and should like to express five comments.

First of all, transparency in food safety and the controlling of this are of course extremely important. More rules and greater control are not in themselves a guarantee of improved food safety: we can only put an end to tinkering with
food if we also demand transparency. Information on businesses that have a rather casual attitude to food safety must be made public. Those who tinker lose customers. Transparency is an important condition for food safety, and we welcome the compromise reached.

Secondly, the financing of the controls must be fair. We must combat unfair aid to businesses and unfair competition. Granting small businesses a discount enables us to accommodate this category of business, which is very important within the food sector, to some degree.

My third comment concerns the proper, fair application of this legislation. Our group has been advocating equivalent controls and equivalent methods throughout the EU. It must not be the case that a cargo is rejected in Rotterdam on food safety grounds yet subsequently enters the EU via a different route. Our question to the Commission is as follows: can the Commission assure us that, in the interests of European citizens and of fair competition, it will monitor the proper implementation of this legislation closely?

Fourthly, our group warmly welcomes the assistance that the EU is planning to give to developing countries to help them build capacity in order that they can comply with European food safety rules. This kills two birds with one stone: the EU increases the safety of imported food products, and developing countries obtain important assistance in taking measures capable of improving their food safety situation and thus their trading position. Food safety must not be a cover for protectionism. We also have to keep current events in mind here. In view of the outbreak of avian influenza in Asia, it is important that food safety is controlled right from the countries of origin. Can the Commission confirm that this and other Community legislation offers the EU effective protection against carry-over of contagious diseases such as avian influenza?

Finally, it remains for me to make a comment of a general nature. On behalf of the Group of the Party of European Socialists, I should again like to thank Mrs Paulsen, and also the Council and the Commission, for their constructive work. We hope that this milestone brings an important piece of work over the past five years to a conclusion, and we look forward to hearing the Commission’s answers.

Staes (Verts/ALE ). – (NL) Mr President, Commissioner, ladies and gentlemen, the compromise that has been reached among four groups ensures that this Regulation on controls can soon be published in the Official Journal and can largely enter into force on 1 January 2006.

It was a great pleasure for my group to take part in the discussions on the compromise, not least on account of the reference to criminal law in Amendment No 206.

I now hear that the Council is very reluctant in this regard. I regret that the
Council is not currently taking part in the debate or expressing an opinion on the compromise that we have reached among four groups. Consequently, I support the request by Mrs Klass, albeit for reasons other than language, to postpone the vote until tomorrow. This will give the Council another chance to deliberate and express its opinion on the reference to criminal law in Amendment No 206 to the plenary sitting.

I should like to emphasise a number of elements of this Regulation that are important to our group. The first, of course, as the rapporteur herself has said, is the extension of the scope of the Regulation from feed to animal welfare and animal health. The second is the explicit statement of the need for controls to be carried out without prior warning. The third is the need for official checks on self-monitoring and labelling controls. The fourth is, very practically, the avoidance of conflicts of interest among controllers. In Belgium, we have learnt that those still exist. There are still self-employed veterinary surgeons, with their own practice, who are carrying out controls. The fifth is the imposition of quality conditions on laboratories. The sixth is the need for cooperation between national and regional authorities, as the MPA case has taught us.

Finally, since international networks are very often active in this field, international cooperation between control and customs services, and also between authorities, is tremendously important, as is the introduction of liaison bodies. I believe that we are taking a major step forward in the form of this Regulation, and I hope that we can adopt the compromise of the four groups by a large majority.

Hyland (UEN). – Mr. President, I would like to join with the other speakers in complementing the rapporteur for her work on this very important report. The food scares experienced in recent years must never again be allowed to reach proportions which threaten European consumers, farmers and the agrifood industry. I believe that great credit is due to the Commission, in particular Commissioner Byrne, for systematically putting forward a series of legislative proposals which aim to address each of the issues that needed to be tackled to guarantee our consumers a safe and traceable product, from farm to fork.

This particular proposal addresses some clear weaknesses which have been highlighted in the control services. Tremendous effort has been made to facilitate a first reading conclusion of this dossier before the end of the legislative period. The Commission initially sought to introduce criminal sanctions, but faced with the Member States' unanimous opposition to this approach, the Commission wisely decided to settle for a statement on the matter.

As regards the issue of scope and whether the proposed regulations should take in all aspects of animal health and welfare, or only those aspects impinging on food safety, I am glad that in the final analysis the Council accepted the wider scope that was urged by Parliament.
The fees issue was also hotly contested. The latest text allows a situation whereby the collection of fees will continue to apply to those activities that are currently subject to fees — i.e. meat and fishery products inspection, veterinary residue testing, and controls on live animals.

Bernié (EDD). — (FR) Mr President, following the succession of food scares we have experienced, such as foot-and-mouth disease and BSE, action must be taken, but not at any cost.

It seems to me that, pursuant to Article 175 of the Treaty, it would be illegal to impose penalties of the kind that the Commission is proposing. Further, together with my colleague Mr Blokland, I tabled an amendment for their deletion before the Irish Presidency lifts the penalties for intentional actions or serious negligence. I do not think it is acceptable for the cost of inspections to be harmonised by means of a European fee. Firstly, it is already difficult enough to implement such a measure, given the diverse modes and costs of production in the current 15 Member States. How could this function in an EU of 25 Members, given that this fee may not differ by more than 10% from the average within the Community? Secondly, in legal terms, it is not for Parliament to decide on the introduction of a European tax. I would remind you that such a measure depends on a unanimous decision by the Council.

In addition, it is necessary to remain firm on import controls. It would be difficult to justify imposing strict controls on European Union operators if those from third countries were able to avoid them. In addition, special provision must be made for primary producer installations. The continuity of family businesses producing much-appreciated traditional products that made their areas famous must not be threatened. To conclude, the Commission does not have the competence to assess the extent to which national measures conform to the regulation under discussion.

Goodwill (PPE-DE). — Mr President, I would like to thank Mrs Paulsen for all the work she has done to come to this complex compromise. Whilst welcoming the animal welfare aspect of this proposal, I agree with Mrs Klaß that maybe we are rushing a little and we need time to look at every aspect of this rather complex deal.

I am also worried that once again we may be coming up against the law of unintended consequences. You may recall that when the original slaughterhouse regulations came forward, the UK Government got hold of them and goldplated them. This resulted in very high costs for some small slaughterhouses which, faced with those costs, closed. That then resulted in animals having to travel very large distances to slaughterhouses.

As regards charges, in the case of this particular proposal, whilst it is true that different charges being levied in different countries is a distortion of the free
market, common charges would not reflect the differences in cost of inspections in, for example, Lithuania as opposed to Germany. We now seem to have a balance where the cost will reflect the actual cost of those inspections, but it is possible that there will be loopholes, particularly in the way that some countries define 'small operators'. Yes, I support exemptions for small operators, but I can see how some countries that want to subsidise production in certain remote areas would use that definition.

Secondly, on the issue of 'naming and shaming', nobody could be against freedom of information – we are all in favour of transparency and openness – and not to be in favour of it would be to support secrecy. We need to be careful, for example, to look at the situation in the UK, where if you are prosecuted you appear in the paper, but if minor infringements are discovered, such as a cracked tile in a slaughterhouse or a piece of mouse dirt in a restaurant, this does not appear on the front page of the local newspaper.

In conclusion, whilst I appreciate the good intentions, we need to look at this more carefully to make sure that we do not once again come up against the law of unintended consequences.

Whitehead (PSE ). – Mr President, we are in the presence of the old hands today – that group of Members who have tried to deal with the questions of food safety and hygiene in cooperation with the Commissioner throughout this parliamentary term.

I want to pay personal tribute to Mrs Paulsen, who has brought through a number of complex, difficult measures of this kind. Mr Goodwill said that these measures have unintended consequences. I would remind him of the principle of 'unright time', according to which people always say that the time is not right for doing something. Well, it is high time to be doing what we are doing in this area. The institutions have come together. There have been significant changes in the proposals for sanctions, financing, transparency and import controls. That, with the input of the Council, has made this a good proposal, and a very good one for Mrs Paulsen to end on, because I know this may be her last report in Parliament. She deserves all our thanks.

The main issues that have been raised and which I wish to touch on are, first, how the balance of fees is being struck in a way that is fair to small operators, as Mr Goodwill said, but nevertheless does not allow exploitation and evasion of the rules by some.

Second, how far we can specifically assist developing countries in meeting EU standards. How are these standards going to be applied and what assistance are we able to offer? Most of all, how can we guarantee the system of prior notification for high-risk products at ports that have the necessary facilities to deal with them? There is a big question mark concerning these ports of entry
and recent experience shows that we have to deal with this issue.

Finally, I am particularly glad that we have reached some agreement on the issue of sanctions. Sanctions as originally proposed were unwise and would not have worked. I am pleased to say that the route we are now taking, which has been agreed by most of the main players, is likely to lead to success.

Breyer (Verts/ALE ). – (DE) Mr President, although it is consumer protection that interests people most when we talk about Europe, it has to be said that little has been done here, and that this framework directive too will fail to provide any guarantees that the food scandals of recent years will be a thing of the past. Unfortunately, food controls are still a farce. This directive is indeed successful in many areas, and we Greens are particularly pleased that animal welfare has finally been incorporated into food controls. The intensity of controls has also been improved, so that national control reports are now also required. Nevertheless, an investigation carried out in Germany has just highlighted the fundamental problem, which is that not enough controls are carried out in practice. We need much more funding for food controls, so that controls can be carried out more frequently, and so that anyone breaching food regulations runs a genuine risk of punitive action. That remains the weak point in all the Member States.

We would also like to have seen laboratory methods brought in line, with some harmonisation of how controls are implemented in the Member States. What we also urgently need – and I have not given up hope, Commissioner, and would be pleased if you could say something about this – is for a consumer information directive to be brought in at last, mirroring the environmental information directive. That would mean that just as consumers, the public, have the right to know what is happening in the environmental world, they would also have the right to know what is happening in the food sector.

My very last point is this: I hope that the Council will stop playing hide-and-seek and tell us today in the clearest possible terms what the position is on fees and fines, so that this is clear when we come to vote, because we cannot demand more food controls and improved animal welfare if the Council is secretive about this point and there is a lack of transparency towards this House. That is all we want. Because what we need is food controls …

(The President cut off the speaker)

McKenna (Verts/ALE ). – Mr President, I would also like to congratulate Mrs Paulsen on her report. Some very important aspects have been included, as many other people have mentioned. I am especially pleased with the inclusion of animal welfare. Some people dismiss this as an issue but I think it is very important.
On the issue of controls, this is something that relates not only to this issue but also to a vast area of legislation in the European Union, where legislation is in place but it is not enforced; there are no controls. It is important that if you have legislation and rules, they must be enforced. You cannot do that without proper and adequate controls.

I am most concerned about the issue of sanctions; it is regrettable that they are not included. You will not force Member States and companies into complying with the law if there are no adequate sanctions in place. We have seen in the past that companies responsible for feed scandals never go to jail; those responsible within those companies are never properly penalised. There are derisory fines which are no deterrent to any continuation of these kinds of offences. We are not going to find a way forward without sanctions, because we need both the carrot and stick approaches to ensure that the legislation is complied with.

Byrne, Commission. Mr President. I am grateful that Parliament has accepted our proposal on official feed and food controls so favourably, and that it has endorsed the need to ensure an improved monitoring system of the food and feed chain at national and Community level.

Allow me to underline once more my appreciation for the intense and productive contribution of the various committees and to stress the importance and sensitivity of the issues under discussion today, which have been raised and explored as a result of Mrs Paulsen's excellent work.

I understand the emphasis put on certain aspects, such as increased transparency and the recognition of the efforts of good businesses to produce safe food and feed. The Commission regrets that its proposal to introduce penal sanctions is not supported by Council and Parliament. The Commission considers that the use of penal sanctions would be an important strengthening of controls on food and feed operators. The Commission disagrees with Parliament's and the Council's view that Article 55(2) and (3) relate to the third pillar. On the other hand, it notes that this issue has already been submitted to the Court of Justice for determination in another case.

In these circumstances and taking into account the overall political context of this procedure, the Commission is prepared to withdraw Article 55(2) and (3) of this proposal, awaiting the Court's determination of the issue and reserves the right to propose again measures providing for criminal sanctions in this field.

Mrs Paulsen raised the question of sensitive treatment of small enterprises and I would refer to the provision in the legislation that provides for a special case to be made in respect of small enterprises. I know from her extensive experience in dealing with food safety issues in this House, that she will be aware that similar sensitive provisions have been included in the hygiene regulation. She will also be aware from Commissioner Fischler's recent review of the CAP proposals that
special provision has also been made there for the funding of small and medium-sized food enterprises, particularly in rural areas, throughout the EU.

Mr Parish raised the question of import controls. Third countries must give guarantees on compliance with EU law. If these guarantees are not given, imports will be submitted to special controls, or not be allowed at all. Imported food and feed will be submitted to import controls upon arrival. That control system is based on risk: the higher the risk, the more intensive the import controls. For example, food that may contain certain toxins will be checked intensively.

Mr Whitehead then raised the question of how we can guarantee that the prior notification system works properly. There is already a system in respect of veterinary controls, where there is a form that deals with this issue of prior notification. A modest adjustment will be made to the existing provisions in relation to the veterinary controls to take this particular system into account. Thought has been given to this; my officials have noted this issue as one requiring attention and it will be dealt with at a technical level.

Mr Parish also raised the question of animal welfare. As he probably knows, animal welfare aspects are not included in the WTO (World Trade Organisation) sanitary and phytosanitary code and there is therefore no international consensus on the organisation of controls in respect of animal welfare rules with our trading partners. The Commission's proposal is to conclude agreements with third countries on animal welfare. The Commission has also raised the matter in the OIE in order to bring the matter on to the international agenda. There was a conference in Paris a couple of weeks ago that I attended, where the OIE has clearly indicated its intention to upgrade the whole question of animal welfare in international trade. This legislation also provides for national control measures to be put in place so that the FAO can inspect them and be satisfied that they work properly.

Concern was expressed about the deflection of trade from one harbour to another and whether this would arise or not, owing to different levels of inspection and the application of less expensive control measures, thus creating an advantage for food business operators. For this reason, the proposal provides for a standard level in the veterinary sector. With regard to control measures, the proposal will contribute to reaching a harmonised level on import controls. I believe that the essential elements to avoid deflection of trade are included in the proposal.

Mrs Klaß raised the question of the system of inspection fees and why they cannot be regulated at a more central level. There are a number of reasons for this and some have been referred to by a number of speakers earlier today. The inspection costs, for instance, are different across Europe. This is due to differences in salaries, energy costs, etc. The fees in several Member States are regulated at local level, which results in different fees within a single, individual Member State. It is impossible for the Commission to exercise its control
powers in view of the complicated methods for auditing national or regional financing systems. Therefore, the proposal on the table is believed to be the appropriate response to this somewhat complex issue.

To conclude, I confirm that the Commission accepts a substantial number of the amendments that have been tabled. A full listing of the Commission's position on each of the amendments is being provided to Parliament, and I trust this will be included in the record of this session. In the event that there are amendments tabled that are not part of the package, the Commission will not be able to accept them.

President. Thank you Commissioner Byrne.

The debate is closed.

The vote will take place today at 12 noon.

See Annex.

Intellectual property

President. The next item is the report by Mrs Fourtou, on behalf of the Committee on Legal Affairs and the Internal Market, on the proposal for a directive of the European Parliament and of the Council on measures and procedures to ensure the enforcement of intellectual property rights [COM(2003) 46 – C5-0055/2003 – 2003/0024(COD)].

Byrne, Commission. Mr President, this proposal for a directive on the enforcement of intellectual property rights represents one of the main elements of a Commission action plan of November 2000 to combat counterfeiting and piracy, and complements the recent customs regulation.

Counterfeiting and piracy are on the rise. They harm business, society and governments, as they are detrimental to innovation and creativity and can be very dangerous to public health and safety. Counterfeitors and pirates undermine legitimate business and culture as they copy end products that have involved considerable investment. Consumers and rights-holders are not the only ones to suffer. Member States are deprived of considerable amounts in lost taxation, and employment suffers when the business world is not flourishing. There is also a genuine threat to public order. Counterfeiting and piracy carried out on a commercial scale are nowadays believed to be even more attractive than drug trafficking, and its perpetrators are linked more and more to large-scale organised crime.

This proposed directive is the Community's answer to this threat. It is not an
easy proposal since it touches upon issues which involve many interests, sectors and different ministries in Member States, for instance culture, trade and industry, economy and justice. There has been some very sensitive, sometimes emotional, lobbying both for and against this directive, and I appreciate the sense of responsibility that Parliament has shown in the face of this pressure. However, the need for action is clear and not in dispute.

The Commission believes that, with the text agreed by Coreper on 16 February, we have reached the right moment for a positive decision. The compromise text constitutes an appropriate balance among all interests involved, including rights-holders, commercial users, consumers and intermediaries. This balance has been achieved in a different way from that in the Commission proposal, but it has been achieved. The proposal constitutes a considerable degree of harmonisation and it will provide us with an effective level playing field on sanctions and remedies. This will be essential for creating a business environment where legal players are not disturbed by counterfeitters and pirates.

This fulfil the commitments made by both the Commission and the European Parliament in a communication of November 2000, which resulted from consultations carried out in the context of a Green Paper in 1998. It also contributes to the achievement of the Lisbon agenda.

In view of the safeguarding of the necessary balance and effectiveness of this proposal, the Commission supports the text on the table today, as proposed via the compromise amendments jointly tabled by four political groups. The compromise text is thus the result of joint and very intensive efforts from all three institutions.

I would like to take this opportunity to thank the European Parliament as a whole for the interest it has shown in this important piece of legislation and its very constructive contributions, many of which can be found in the text before us today. In particular, I would like to thank the very competent rapporteur, Mrs Fourtou, the shadow rapporteur, Mrs McCarthy, and the chairman of the Committee on Industry, External Trade, Research and Energy, Mr Berenguer Fuster, for their very professional and efficient guidance within their institution.

Both the Committee on Industry, and the Committee on Legal Affairs and the Internal Market have given the issues at stake great thought, the fruit of which now lies before us in the form of amendments to be voted in this plenary. Consequently, the Commission endorses the amendments that go along the lines of the agreed compromise text: Amendments Nos 1 to 52 and 56 to 100. Amendments Nos 53 to 55 and 103 to 113 deviate from the text and must be rejected. The Commission feels that these amendments would not contribute to the balance and effectiveness that has been achieved in the compromise and, in particular, would not be in conformity with the horizontal approach. The directive should apply to infringements of all intellectual property rights.

In recognition of the harmful nature of counterfeiting and piracy, time should
not be lost. The Commission would encourage the European Parliament to vote favourably on the Council compromise text so as to avoid any delay that would otherwise arise and would only serve the purpose of those trying to profit from illegal practices. Time will not improve this text.

Fourtou (PPE-DE), rapporteur. – (FR) At a time when, as Commissioner Byrne states, counterfeiting and piracy crimes are currently rocketing, it is essential, in the interests of our economy, to put in place appropriate instruments to ensure the protection of intellectual property rights.

I would remind you that the Commission presented its text in January 2003. This initiative had been expected ever since 1998 when the Green Paper was published. Parliament demonstrated its determination to act against counterfeiting and piracy on a number of occasions, notably by voting unanimously on a resolution on this Green Paper and by signing a written declaration.

Being aware of the need to which I have referred, the Committee on Legal Affairs and the Internal Market adopted on 27 November 2003 the amended report on the respect of intellectual property rights by 28 votes with 3 abstentions. Time is of the essence. On the eve of enlargement, there is also an urgent need to establish harmonised legislation so as to ensure respect for intellectual property rights, innovation and creativity in the 25 Member States. Accordingly, an original procedure was used.

At the behest of the Presidency of the Council, an informal three-way discussion was established to seek a compromise. The discussions took three months. In addition to the Council and the Commission, your rapporteur, the draftsman of the opinion, the Chairman of the Committee on Industry, External Trade, Research and Energy and the shadow rapporteurs also participated in this process. I would like to thank them for their help and for their diligence. The Irish Presidency’s extraordinary commitment made it possible for this agreement to be reached in advance of the deadline, and I would like to extend special thanks to them. I am also grateful to the Commission, which did everything in its power to offer us continual assistance.

The amendments tabled today on behalf of the Group of the European People’s Party (Christian Democrats) and European Democrats, the Group of the Party of European Socialists, the Group of the European Liberal, Democrat and Reform Party and the Union for Europe of the Nations Group reflect the text of the Council compromise in every detail. The text is extremely balanced, equitable and proportionate, reiterating our stance on the importance of intellectual property law, taking account of the concerns expressed by Parliament on behalf of a range of sectors, and now containing many safeguards to protect the interests of both right-holders and consumers. In accordance with international agreements into which the Community has entered, the scope of the application of the directive is broadened to cover all infringements of intellectual property
law.

From now on, however, only acts committed for commercial purposes will be regarded as punishable. The definition of commercial purposes excludes acts committed by consumers acting in good faith who do not gain direct or indirect economic or commercial advantage. This extension of the scope of the application does not undermine any of the sectoral directives already adopted on copyright, electronic commerce and computer programs. The exception made for private copying is actually strengthened.

The other important points of the text relate to the need to take account of the rights of defence. Notably, Article 8 on the provisional measures guarantees the right to defence by imposing a time limit, thus limiting the entitlement to institute legal proceedings, and by providing for the defendant to be compensated.

The protection of personal data is strengthened. All measures taken must be justified and proportionate. They must not create barriers to legitimate trade or to competition. The judicial authorities must assess the specific features of each case. They must also assess whether or not the infringement was intentional. All measures envisaged are civil and administrative sanctions. Providing as it does for revision of the directive, especially in line with changes to Community legislation, this is a forward-looking compromise.

If you support the proposed compromise amendments, this directive can be adopted at the first reading, within the life of this Parliament. This will show how efficiently the three institutions can work. It will send out a positive message on integration to the enlarged European Union. It will strengthen confidence in the internal market. This is what is needed to meet the challenge of the Lisbon objectives. It is what is required to ensure that Europe’s economy, characterised by its innovation, can become the most competitive economy in the world.

President. Thank you, Mrs Fourtou; if I am allowed, I will also add my personal congratulations, given that you spoke about an early conciliation. Myself and the other two Vice-Presidents of the Conciliation Committees will therefore have less to do.

Berenguer Fuster (PSE ), draftsman of the opinion of the Committee on Industry, External Trade, Research and Energy . – (ES) Mr President, please allow me to remind you that this is a codecision procedure and that this Parliament is a co-legislating body. And perhaps you are not aware of this obvious fact because I am doubtful whether, in this case, the European Parliament has fulfilled its duties properly.
I will explain. In December, the Committee on Legal Affairs and the Internal Market voted for a text, which is not going to be approved today, but rather certain amendments are going to be approved which differ radically from what was voted for in that meeting of the committee. Why was there this disparity? Because what the Committee on Legal Affairs and the Internal Market voted for responds to the honourable Members’ will, while the ultimate paternity of the text we are going to approve today corresponds to the Council.

Please do not imagine that what I am saying is in any way a criticism of the rapporteur; far from it. Mrs Fourtou has done good work trying to reconcile positions, but in the end she has been faced with an inflexible position on the part of the Council, which has said ‘if you want the Directive to be approved, you must approve what we say’. And since we are aware of the need to approve the Directive, what we have carried out – and Mrs Fourtou in particular – has been an exercise in responsibility. But sometimes we should ask ourselves whether we also impose this exercise in responsibility on the Council.

There can be no doubt that this Directive is necessary, but nevertheless, it is doubtful whether the text approved will resolve the problems which have been raised. I believe it is no mistake to say that the text approved is going to be the laughing stock of commentators and is going to cause many difficulties for the Member States when it comes to incorporating it into their internal law. The Council’s desire to prevent the European Commission’s initiative from containing, for example, criminal law provisions, has created such confusion between civil sanctions, administrative procedures and administrative sanctions, that I cannot imagine what the Member States are going to do when it comes to applying it.

We are clearly going to approve this text, but with great scepticism. At the same time, the Spanish Socialists at least are going to support certain amendments in order to reflect the fact that the Council, with the enforced cooperation of the European Parliament, has completely undermined what was originally a very good Commission initiative.

Niebler (PPE-DE). – (DE) Mr President, ladies and gentlemen, I would first like to very warmly thank the rapporteur, Mrs Fourtou, for her excellent work. I am sure that it was really not easy to reach agreement on this complex dossier not only between the groups but also with the Council and the Commission. The text now before us, which is to be voted on tomorrow, is a good compromise that we should all accept.

We are all familiar with fake, cheap Rolex watches, Lacoste shirts, with the cheap imitation Levi Strauss jeans, Louis Vuitton bags, and many other products besides. Music and films on CD and DVD are being pirated. When you see everything available on the market, you might well think that product piracy is a trifling offence. But it is not, ladies and gentlemen, far from it: counterfeiting and product piracy certainly are not minor offences. They cause
losses running to millions in Europe every year and they are consequently a threat to our economy and above all to jobs in Europe.

The object of the directive is to create uniform ground rules for combating product piracy. On the eve of EU enlargement, it gives the right signal at the right time. What is the directive intended to achieve? It is of course intended to have a deterrent effect on product pirates and counterfeiters. The directive provides a process-based framework here. It does not actually introduce anything new, but it attempts to provide a new framework in terms of process, so that we can take action against product pirates across Europe in accordance with uniform rules.

What should the directive not be allowed to do? It should not of course be allowed to criminalise or stigmatise young people who occasionally download some music from the Internet, but the directive has also made provision for this. The criminal penalties originally included in the draft have been taken out again – also thanks to the pressure exerted by our rapporteur – and the directive stipulates that sanctions should only be applicable in a fair and proportionate manner. There are provisions that go beyond these mechanisms in order to prevent young people from being criminalised. The directive makes this clear and it will not come to that.

One point that Mrs Fourtou also mentioned, and with which I agree, is that the directive should not of course create any barriers to competition. It is not acceptable for competitors to be kept out of the market by relying on alleged infringement of copyright. A recital has been specially included in the directive to the effect that this should not be the aim of the directive.

The directive, including the amendments we are to vote on tomorrow and which I hope will be accepted, provides a good, fair compromise between the interests of all the parties involved, and I urge you to support the line taken by the rapporteur.

McCarthy (PSE). – Mr President, we all know that counterfeiting and product piracy has reached epidemic proportions. The lack of harmonised enforcement rules means that counterfeiting is a low-risk business where for a low investment counterfeiting pirates are guaranteed enormous profits. The UK’s Anti-Counterfeiting Group has estimated that as many as 4 000 people lose their jobs as a result of this trade and that the GBP 1.75 billion lost in VAT alone could build four new hospitals a year.

Clothing and footwear companies suffer the greatest losses and consumers are the victims. Their health and safety is put at risk with fake medicines, foodstuffs, toys coated in toxic lead, flammable children's clothing and fake alcohol containing high levels of methanol which has led not only to people being hospitalised but also, in one case in Scotland, to the death of a woman.
In my own region, north-west England, trading standards intellectual property groups' seizures of counterfeited pirate goods is on the increase. Here is one example: this is a Manchester United football shirt, coveted by many youngsters. It is a fake, but was sold to consumers on the high street at full price. Far from a bargain. This is a packet of Viagra, now available over the Internet. 50,000 such packets were seized at a house in Oldham. They are imported from Thailand and distributed by a vast network of counterfeiters across the region.

There is also a more sinister side to this counterfeiting and piracy. The Organised Crime Task Force in Northern Ireland has reported that nearly half of all organised crime groups are involved in IP crime. Two thirds of these groups have links to paramilitary organisations, so the draft law we are voting on today should be seen in context. It is not as ambitious, radical or draconian as many opponents would like to portray. Nor is it a panacea for rights holders. It is a first modest and cautious step in an EU-wide commitment to fight counterfeiting and piracy.

I would like to congratulate the Irish presidency for having agreed a text which is balanced and proportionate and whose actions are focused on tackling genuine and serious acts of infringement. Bona fide consumers engaged in acts on a commercial scale have nothing to fear from this new EU law, as consumers acting in good faith are excluded from its scope.

A further safeguard is that commercial scale is defined as acts resulting in commercial and financial gain. Moreover, action can only follow, as a result of a justified and proportionate request by the claimant, on the authority of a competent judge or court and only for intentional infringements on a commercial scale.

Contrary to the hysteria and misrepresentation spread by certain sections of the EU press, there is no question of dawn raids on teenagers in their homes. The law has no criminal provisions. It is restricted to civil and administrative remedies. There are no double damages. The directive reinforces judicial discretion and ensures that remedies are fair, equitable, proportionate and justified.

This is an enforcement directive and one that cannot write IP law. Nor can it rewrite it or change e-Commerce law, in particular the responsibility of ISPs as defined in Articles 12 to 15 of the e-Commerce directive. It cannot undermine the right to private copying as provided for in the Copyright directive, and in fact reinforces that right and protects the right of privacy. The actions taken must guarantee compliance with data protection laws.

Article 23 provides for an assessment of the impact of the directive and Parliament will take that seriously. The intention is to show that it is applied in a balanced and proportionate way and it should be stressed that the directive must not be used to abuse the right of legitimate competitors to enter the market.
place, in particular that for generic medicines.

Finally, I would like to congratulate the rapporteur on her willingness to compromise, and the Irish presidency for its determination in forcing all parties to come to agreement. We must today take the bold step of voting this law onto the statute book. We must send a signal to counterfeiters and pirates that we are serious about closing the enforcement loopholes that they exploit. We must give judges and courts in the enlarged EU the option of a range of enforcement tools. It is time for the EU to get tough on counterfeiting and piracy. It is time we stopped allowing counterfeiters a free ride at the expense of consumers, legitimate businesses, EU jobs and the EU's competitiveness.

IN THE CHAIR: MR DIMITRAKOPOULOS
Vice-President

Manders (ELDR ). – (NL) Mr President, I should like to thank Mrs Fourtou, all the shadow rapporteurs, and also the Commission and the Council, for the structured, constructive cooperation that we have enjoyed over the past three months because, to my mind, the way in which a compromise has been achieved on this Directive is exceptional. The Committee on Legal Affairs and the Internal Market took a rather different view, but, ultimately, I think that this compromise is a start, and indeed I hope that it is adopted.

We finally have recognition of intellectual property rights throughout Europe. Although there were already various directives and laws in existence, for example regarding copyright, e-commerce, and software, there was no discussion – or at least insufficient – of enforcement, and as a result we in Europe find ourselves with a hotchpotch. In that regard, it is good that we now have a kind of umbrella legislation for harmonised implementation, throughout the EU, of all the directives already in existence in the field of intellectual property rights.

As many have now said, counterfeiting and piracy within Europe are growing hand over fist. We are seeing criminal organisations switching from drug trafficking to counterfeit goods because the chance of being caught is minimal and there is just as much money in it, if not more. I think that we must call a halt to this. I think that we need a harmonised approach, not only because criminal organisations are earning money illegally from these goods, but also in order to protect our economy, to achieve the Lisbon objectives, and ultimately, in particular, to protect consumers.

Why so? We are not just talking about pirated CDs, as some people think, but about a broad spectrum of products that are being counterfeited. I shall take toys as an example. I have seen toys that contain cadmium. Under the Directive on cadmium, this substance is prohibited in toys manufactured in Europe, but counterfeit products can still contain it, as they are illegally imported. Medicinal
products are another example. There are examples of painkillers that contain talcum powder, and I think that this is unacceptable. Much money is to be made from it but, in my opinion, consumers must be protected. Even aircraft parts are being counterfeited, because there are large profits to be made from this. It is a good thing that something is being done to put an end to this.

I was the one who, at the Green Paper stage, suggested including a reference to criminal law. The reason for this is that we would not buy a stolen bicycle, because it has been stolen – our principles would not allow it – but we would like a counterfeit Breitling watch or other counterfeit product, because it is cheap. If this is included in criminal law, and possession of a somewhat dearer counterfeit product becomes a punishable offence, there will no longer be a market for this, and there will no longer be an incentive for organisations to produce counterfeit goods.

It is a shame that certain strict rules have not been included, as my colleague Mr Berenguer Fuster has already remarked, but I nevertheless welcome the compromise that has been reached. A large number of ambiguities that lobbyists have been using up to now as arguments for voting against it have been removed from the proposal. It is my opinion that this proposal is the beginning of the end of counterfeiting, and I hope that this will develop into a fully-fledged directive with fully-fledged means of monitoring compliance with it.

Fraisse (GUE/NGL). – (FR) Mr President, ladies and gentlemen, I would like to return to the different stakeholders in this directive and to the parties affected by it, to whom the Commissioner referred – consumers, industrialists and artists. I do not want them all to be put on the same footing.

Firstly, as regards consumers, I regret that the Commission proposal has not been kept as it was. I regret it has been broadened rather too far, in that it holds consumers, as – shall we say – citizens, every bit as responsible for piracy as industrialists. This is my first point on consumers. Treating all European citizens as consumers in this way seems simplistic.

The second very important point is this: If this directive seeks to combat something that exists now, how will things turn out in the future? Over the last few years, discussions concerning intellectual property and industrial property have highlighted the difficulties relating to borders. Some say that intellectual property is the oil of the twenty-first century. They may be right. If intellectual property really is the oil of the twenty-first century, then of course it is important to talk about it. Nonetheless, the fact that this House has discussed such matters as the ability to patent living organisms or free software suggests how important the issue of borders will be in future.

Even if this problem has not yet arisen, it definitely will in future. Not everything can become industrial or intellectual property. It is essential to raise this issue, but in a sensible manner. Borders will certainly be an issue in the near
future and thereafter even if they are not yet one today.

This leads me to speak on behalf of, or to speak for, those who use acronyms. I am of course talking about artists. Are artists happy to be equated with industrialists? As a member of the Committee on Culture, Youth, Education, the Media and Sport, I do my best to listen to all those sectors. From what I have read and from what I understand, we would do well to take account of artists’ views on intellectual property. If we take account of the views of industrialists and consumers, should we not also consider artists, especially as they are always referred to in connection with the need to combat piracy?

As regards artists, authors’ rights and intellectual property do not appear to be the only problem, and that – as music and music piracy are talked about so glibly – young artists and creative artists would like a different approach. It may be necessary to defend these artists appropriately in this regard. I do not believe that the House should allow all these various parties to be dealt with in the same way.

Echerer (Verts/ALE). – (DE) Mr President, ladies and gentlemen, I would first like to thank Mrs Fourtou for her openness, which was exemplary. Right from the start all the shadow rapporteurs were involved in the discussions and also in the trialogue. That is something I have rarely experienced in this House. And she did that long before her family circumstances were seized upon by the press. I do not wish to comment on that now, I shall leave that to my colleague. So much for the form.

There are problems, however, as has already been mentioned, particularly by the previous speaker. That this directive is needed is something on which everyone – including Members of this House – agrees. So do the players in the market, ranging from the telecommunications industry to consumer protection organisations, from the pharmaceutical industry to generic drug manufacturers, from artists to content producers. We need a good directive. I believe, though, that the compromise that we have negotiated has no entirely succeeded in addressing these many and diverse needs and concerns in a single directive.

There are two specific policy areas where reasonable agreement is important. One is that we wish to limit the scope of the directive somewhat, to use for commercial purposes; the other area is that of patents. There is certainly scope for debate about patents and also about common practice in Europe. But it remains a fact that we do not have a European-level patent, and we do not want to use the implementing directive to pave the way for one through the back door. This needs to be discussed very carefully; it is not such a simple matter.

I therefore urge you to give a large measure of support to these two amendments on patents and the scope of the directive. I believe that this directive, this compromise, will then have been sufficiently improved for us to jointly adopt it as a compromise before the end of this parliamentary term.
Cappato (NI). – (IT) Mr President, contrary to Mr Imbeni, I do not want to praise the procedure followed because an ‘early conciliation’, as Mr Imbeni put it, is not a good procedure. There is a good reason why the conciliation has its rules and its methods of proceeding: in order that a large number of MEPS, and Parliament itself, might be involved in the debate and in clarifying the uncertainties in the text that little by little takes shape. This also means that it is not, then, four or five representatives from political groups that commandeer the procedure to achieve a compromise text a few days from the vote, with orders for MEPS and individual MEPs in the groups to toe the party line and not to touch what four or five MEPs have decided in this early conciliation. I, contrary to Mr Imbeni, do not consider this to be a good procedure. We then notice the implications in connection with this report. It is not true that this compromise clearly limits the scope. If this were the case, if this were also your intention, then you would, for example, be able to adopt Amendment No 101 – which we tabled with some other Members – which explicitly limits the scope to intentional infringements for commercial gain. The truth is that, even though criminal sanctions have been removed from the compromise, preventative measures remain that are very dangerous regardless of the outcome of the inquiry and the procedure. The risk is adopting a system which thus makes it simple, and even partly up to private companies themselves, to search, confiscate goods and take preventive measures that risk putting the market in a situation of uncertainty and instability, where those who are most organised in having lawyers and legal consultations – large corporations – will best succeed in scaring and blackmailing small and very small businesses and also the end consumer.

It is not true that private copying is excluded from the scope of this compromise, because it is not excluded from preventative measures. Why all this? Why was it necessary to do all this and to devise this type of special emergency legislation? Perhaps because the laws on intellectual property are laws that have been superseded to a large extent by digital technology. The risk is that you, the very people who want intellectual property to be respected, in the same way as physical property – and this is also our concern – end up adopting laws that cannot be respected. It is not with policing measures and private policing that the desired objective is achieved. Such measures achieve the opposite, that is to say they delegitimise the power and value of the laws.

Fiori (PPE-DE). – (IT) Mr President, Mrs Fourtou tackled a very complex issue. In order to achieve framework legislation, I believe that a lot of work will have to be done in this Parliament’s next parliamentary term. I must congratulate my colleague Mrs Fourtou because I believe that she has put together the best of the possible compromises. As with any compromise, however, I did unfortunately find some shortcomings in this report. For example, even providing for potentially effective instruments to combat activities such as peer to peer or fair sharing, does not allow for the content provider to be fully protected, a situation which risks seriously compromising
the reliability of any library. The report is directed solely at crimes committed
on a commercial scale and not more generally at infringements of intellectual
property rights regardless of how or by whom they are committed. A lot of
attention clearly needs to be given to this point in order to find a point of
balance. This was a long task that lasted many months. I do, however,
remember that, from the outset, the objective in terms of protecting copyright
was to combat and stop the phenomenon which, alongside counterfeiting and
piracy, allows material protected by copyright to be used illegally to the
detriment of the work of all content providers who are legitimately building up
the value chain for the use of audiovisual products.

Particularly in future, we need to reflect further on the issue of the amount of
private use that has increased exponentially thanks to the impetus provided by
digital technology via broadband or any other advanced technological platform.
This will cause a significant and quantifiable commercial prejudice for all the
content providers that base their operating model on the legal distribution of
content, subject to contractual agreement with the parties entitled. In this area,
too, we need to consider the consequences of the new legislation on
telecommunications. In fact, not only does the wording of the proposal for a
directive lose sight of some important aims, but it does not even constitute an
effective deterrent against infringement because, in the long process in which
the various proposals were made, the possibility disappeared of compensating
for the two-fold prejudice in the form of loss of profit and loss suffered. I
confirm that, in the short term, to obtain an effective instrument, we need to
give maximum support to the rapporteur, Mrs Fourtou, and that, in future, we
must do a lot of work in this area.

I have two final remarks, one relating to Recital 22. This states that prohibitory
measures can be taken against intermediaries whose services are used by third
parties only to infringe industrial property rights and not, as provided for in
Articles 10 and 15, intellectual property rights. Such a discrepancy between the
text of the regulation and that of the Recital is not without importance, because
it signifies an intention to support an interpretation whereby the term intellectual
property contained in the text of the articles actually refers only to cases of
intellectual property. I therefore call on Mrs Fourtou to table an oral amendment
in which ‘industrial property right’ is replaced by ‘intellectual property right’. In
this regard, I am thinking about Italian producers protected by geographical
indications, who, in a situation of this type, could not obtain an injunction in
other European countries against, for example, traders, carriers or advertisers
who sell, transport and publicise counterfeit Italian products.

A final comment on Article 16. I think that it is really important that the final
phrase of Recital 23a is reintroduced as a final paragraph of this article. In the
absence of such regulatory specification, you might think in many countries that
if – after the person in possession of counterfeit goods in good faith has paid
compensation – the judge waived the prohibition of the sale, and exclusion from
the commercial chain, of these products, they would be authorised for any
commercial use. If we think, for example, about the whole medical field, this
Mr President, this morning’s debate creates great confusion, because the positions we are hearing are very different. Some people tell us that Mrs Fourtou has achieved a wonderful compromise and others tell us that the big political groups have behaved like a kind of steamroller. We have heard speeches from Members of the different political groups, including the big ones, expressing very different opinions.

Mrs Fourtou has tried to speed up the legislative process with what we could call ‘a proto-conciliation procedure’, but I believe we should assure Mr Imbeni that the procedure remains in place. The problem is that the current procedure for approving legislation in the European Union, before the adoption of the European Constitution, is a truly elaborate, complicated and difficult procedure. The recently signed Interinstitutional Agreement intends to eliminate these difficulties, but we know that that is going to be very difficult to achieve in practice. And this is because if there is no clear identification of a legislative body – which I believe must be as unified as possible – we are condemned to continuing to adopt this type of legislation in which there are great contradictions.

Mr Berenguer Fuster said that the Committee on Legal Affairs and the Internal Market reflected the views of the Members of Parliament. I disagree with that, because the majority of reports approved – including by a great majority in the Committee on Legal Affairs – are usually then rectified in plenary. In other words, as a result of its composition, the Committee on Legal Affairs and the Internal Market does not currently reflect the will of the whole House. Mrs Fourtou has tried to achieve an agreement which does not reflect the opinion of the Committee on Legal Affairs. I do not know if she will achieve that agreement, because we do not yet know what the result of the vote will be.

We are talking about a report with many amendments, with enormous amendments, and which, theoretically, should not affect substantive law. We are talking about a right relating to the application or implementation of the substantive content. Mr Berenguer may be right about the confusion between civil, administrative and criminal enforcement procedures, but it appears that the attention has been to eliminate criminal enforcement or, at least, the possibility of criminal proceedings, and this is due to the European Union's lack of competences in the criminal field.

On the other hand, the scope of the directive has been extended – or it is intended to do so – so that it also includes the field of patents, which is a field in a degree of turmoil.

My impression, Mr President, is that this first reading is going to produce a text typical of these Community institutions: a kind of camel – that is, a horse designed by a committee – and that it will probably only be the beginning, but I
believe it is preferable for us to adopt this proposal for a directive as quickly as possible, at least so that we may have a departure point to work from, firstly in the second reading and then, no doubt, when further legislative proposals are needed.

De Clercq (ELDR). – (NL) Mr President, I congratulate the rapporteur on her sustained efforts to achieve compromise amendments and, through the necessary contacts, to accomplish a compromise text. We shall thus escape a second or third reading.

Reference has been made many times already to the adverse consequences of counterfeiting in all kinds of fields, and to the risks to public health and innovation. The situation has worsened over the past three years, and all kinds of product are now found, even current consumer goods. The extent of the phenomenon is becoming increasingly alarming, and organised crime is increasingly involved. An initiative at European level is urgently needed, therefore, particularly as these phenomena are largely based in the new Member States.

The positive points in the report include the fact that the Directive is to apply to all infringements of intellectual property rights. Member States must also ensure that any serious infringements of intellectual property rights are classified as criminal offences punishable by criminal penalties. It is well-known that creativity and innovation are the key trump cards in our European economy, and so they must enjoy sufficient protection. I should like to appeal for support for the rapporteur in her fight, therefore.

MacCormick (Verts/ALE). – Mr President, representing, as I do, a constituency which is associated with such products as Scotch whisky, Highland shortbread and Borders knitwear, I am fully aware of and sensitive to the points many have made about the evils of counterfeiting and piracy, which extend much more widely than just to products of the kind I have mentioned. I, therefore, strongly support the idea of introducing a directive of this kind.

However, I do not agree entirely with Mr Byrne when he claims that a balance has been struck. That is not what we hear from the Generic Medicines Association, which is very fearful that extension of this set of remedies to patent law will damage its interests and thus the interests of the health services of Europe and beyond. A balance has not been struck. Patents must be excluded, and the point about the commercial scale must be extended to the whole of the directive, not just to some parts of it.

Finally, I say with great personal sympathy for Mrs Fourtou that this case shows up a gap in our rules about declaration of interests. The issue of familial interests needs to be included. I say that without any personal discourtesy.
Harbour (PPE-DE). – Mr President, I wish to support my colleagues who have taken a very broad-ranging view of this important proposal. This is not specifically about the digital world. It is about the future of the European economy and about the ability of any manufacturer who has intellectual property rights, whether protected by patent, copyright or registered design, or indeed by any other form of ownership, over a creative work or design that they have genuinely originated, to be able to protect and sell their products in a legitimate way, reap the profits and create jobs within the European Union.

We are talking about the procedure and timescale because we all know that as from the enlargement of the European Union on 1 May there will be major concerns about the inability of intellectual property owners to enforce their rights across the enlarged European Union. Many of my colleagues have given graphic examples of the problems associated with the counterfeiting on a large scale of physical goods that are being shipped into the European Union and essentially sold illegally, thereby depriving people of their legitimate livelihoods. Let us put matters into perspective, since this is the nub of the issue and is why we have supported Mrs Fourtou in her work with the Council aimed at reaching a genuinely balanced compromise that will be in place on 1 May, thereby ensuring we do not have to wait another six to nine months to deal with this problem.

We are in the real world now, and this is not some theoretical piece of legislation but something that will actually protect jobs in our constituencies. As we move towards a world in which more and more goods are coming into the European Union from countries, such as China, that are new members of the World Trade Organisation and where intellectual property enforcement is at best very weak, we have to be able to protect ourselves in a legitimate and balanced way.

That is what is at stake, and those of you who are contemplating amending this proposal with the result that it is not in place on 1 May will have to answer to manufacturers in your constituency when a container load of counterfeit goods from China arrives through an accession country on their doorstep in June. You will have to answer for the impact this will have on local jobs and local manufacturers.

Paasilinna (PSE). – (FI) Mr President, it is important that the common position clearly focuses on commercial activity and the work of professional criminals. Copying on a small-scale for personal use will then be left alone. We have no need or means to interfere when it is a matter of copying by private citizens. In the information society the invasion of people’s privacy is a most dangerous and mostly ignored problem. The counterfeiting of food products has risen by 75% and that of CDs by 15 000%, which is almost half of all musical recordings. Approximately 20 000 jobs are lost each year. It is important, however, that a distinction is made between conscious and unconscious
infringement of copyright. This is also important because it safeguards product
development in small companies by guaranteeing some sort of protection in the
sea of patent legislation. I am happy that there will therefore no longer be
interference in criminal law, an area which lies within the competence of the
Member States. The different practices and laws that exist in the Member States
would make it an especially awkward task. After all, the same package deals
with patents and copyright. Piracy, the result of commercial crime, takes away
jobs. Nevertheless, we should not interfere in the private lives of the innocent.
Let us make additional improvements to the next directive.

Plooij-van Gorsel (ELDR ). – (NL) Mr President, Commissioner, ladies and
gentlemen, the Directive on enforcement that we are discussing today is
completely superfluous. After all, there is already a directive in force regarding
the harmonisation of copyright, and, besides, there is the Directive on e-
commerce, which regulates, among other things, the rights and obligations of
service providers. This new Directive threatens to cause disruption on account
of the obligation to monitor what users are doing. The present compromise
explicitly stipulates that previous directives remain fully in force, therefore, and
that is the way it should be: why else do we make legislation here? We do not
want a US-style situation in which legislation is made according to the
misconceptions of the day. This new Directive on enforcement officially
declares people making illegal copies to be thieves, but everyone has known for
a long time that pirating of software, CDs and DVDs is a punishable offence.
We certainly do not need a new directive to do this, and especially not one that
fails to define the scope of intellectual property rights. We in Europe have
different criminal justice systems with different penalties, and we cannot
harmonise legal systems with a single directive, particularly without a proper
debate in this Parliament. I can say that I am pleased that the compromise now
restricts the scope of the directive to piracy for commercial purposes, as copying
for personal use must continue to be permitted. Nevertheless, I shall be voting
against the Directive.

Turmes (Verts/ALE ). – (FR) Mr President, ladies and gentlemen, the House
finds itself today face to face with a problem of political ethics. We are voting
on a very important report, one that has a wide-ranging impact on economic
affairs and on the citizens of Europe. How are we going to explain to the
citizens of Europe that Parliament’s rapporteur, the person most directly
involved with this dossier, happens to be married to Mr Fourtou, the chairman
of Vivendi Universal? Let there be no confusion. I certainly recognise that every
man and woman has the fundamental right to hold political office. Mrs Kinnock
is a Member of the European Parliament but she does not get involved with
subjects relating to the portfolio held by her husband, Commissioner Kinnock.
Mr Rovsing, a member of the Group of the European People’s Party (Christian
Democrats) and European Democrats, has interests in the media, but he refrains
from voting on media issues.
The credibility of the European Parliament is at stake here. I appeal to the President of Parliament and to the Chairmen of the political groups to find a solution to this problem by noon. Parliament’s honour is at stake. Any suspicion of personal interest must be eliminated if the citizens of Europe are to continue to trust the European institutions.

Bartolozzi (PPE-DE). – (IT) Mr President, ladies and gentlemen, I too would like to thank my colleague Mrs Fortou for the work she has carried out, work that was carried out with great endurance and great determination, precisely because the fight against counterfeiting and piracy must be one of the European Union’s priorities. In fact, creativity, which is one of the main factors of competitiveness in our economic system, is being prevented by counterfeiters because they are affecting the industrial and intellectual property rights. These rights ensure that creativity is adequately rewarded. Often, counterfeiting and piracy also end up affecting consumers, who are forced to purchase goods of a quality inferior to the original. The damage that they cause not only affects the individual holder of the right but the whole of society. The directive on the application of industrial and intellectual property rights is therefore an important instrument in combating the phenomenon and must be quickly adopted before the accession of the new countries, where counterfeiting and piracy are particularly widespread.

The text negotiated with the Council, which Parliament should widely agree to, is a balanced compromise that should enable the directive to be adopted in just one reading. The current European and national legal framework on industrial and intellectual property is being respected. The conditions to effectively protect it and to more actively combat illegal trade are being created. The compromise rightly provides for the most important provisions of the directive to apply only to commercial practices. We cannot, indeed, plan to punish those who download music from the Internet just for personal use. A request for information from the alleged counterfeiter by the person declaring that a product is counterfeit must be justified and proportionate and should only be made by order of the judicial authorities. Furthermore, the directive does not influence the rules on confidential information and the treatment of personal data or the right not to testify against oneself. It specifies the administrative and civil sanctions that, directly affecting any illegal economic activity, have direct consequences on prohibiting counterfeiting. These sanctions should indeed be dissuasive but should also be gradual and proportionate to the crime committed.

Oreja Arburúa (PPE-DE). – (ES) Mr President, firstly, and like other Members, I would like to congratulate Mrs Fortou on her excellent work and also express my regret at the speech by Mr Turmes, who should not really worry about intellectual property since he has only come to criticise Mrs Fortou and her relatives and has not been able to remain in this Chamber for the whole debate. I believe that the fact that certain Members of this House have family relatives – and I would be grateful if Mr Turmes would remain in the House –
does not prevent them from acting in it, particularly since what we are discussing, this Directive in the field of enforcing intellectual property rights, does not exclusively affect right holders, but all consumers.

It is also we consumers who have to ensure that the protection of intellectual property rights is guaranteed, because we want the products we buy to be original and authentic and we do not want to be deceived by people who violate intellectual property rights. I therefore believe that to try to use Mrs Fourtou’s relatives to discredit her work is not worthy of a Member of this House.

There are two aspects which have been fully debated this morning. One of them relates to commercial purposes. It is true that we have modified the Commission's proposal, which was restricted to acts carried out for commercial purposes. We need to go a little further; I believe that the rapporteur’s proposal and the compromise amendments are balanced, and that we had to ensure that anybody carrying out any act against industrial or intellectual property could be prosecuted, whether that act was for commercial purposes or not.

In reply to Mr Fiori, who spoke before me, the inclusion of industrial property is important, and in the case of Spain in particular, since the Spanish legislation in the field of trademarks and patents is considered industrial property rather than intellectual property. The definition has therefore been extended to both.

With regard to the procedure, mentioned by Mr Cappato and Mr Berenguer, what we intended is something very important: to obtain a directive which could enter into force before 1 May 2004. It is therefore true that Mrs Fourtou has had to make certain efforts to reach agreement and that the proposal we are voting on today in this Parliament is not exactly the same as the one voted for in committee. Nevertheless, many of the aspects which were approved in the committee are included in what we are voting on today, apart from the two points I have referred to: commercial purposes and patents.

There are many other aspects that we have revised from the Commission's initial proposal, such as, for example, the reduction of procedures and costs for the applicant, in order to speed up and guarantee respect for their intellectual property rights; the simplification of the guarantees to be provided by the applicant in the event of defending their industrial or intellectual property rights; the establishment of compensation in the event of an infringement of industrial or intellectual property and, finally, considerations relating to the destruction of objects used for counterfeiting or the counterfeit objects themselves.

These are other aspects of the Commission's proposal that we have modified and which, as the Commission has said, make this directive sufficiently balanced for the times we are living in.
President. – The debate is closed.

The vote will take place today at 12 noon.

Simplifying and improving Community regulation

President. – The next item is the third report (A5-0118/2004) by Mr Medina Ortega, on behalf of the Committee on Legal Affairs and the Internal Market, on the Commission communication on simplifying and improving the regulatory environment [COM(2001) 726 – C5-0108/2002 – 2002/2052(COS)].

Byrne, Commission. Mr President, the Commission's communication of June 2002 on simplifying and improving the regulatory environment sets out the comprehensive action plan on which the Commission work on better regulation has been progressing over the last 18 months.

Improving the regulatory environment to obtain concrete benefits for operators and citizens is a joint responsibility of the European institutions and the Member States. When launching its action plan 'Simplifying and improving the regulatory environment', the Commission therefore also called on the other institutions and the Member States to contribute to the achievement of the common objectives.

To the great satisfaction of the Commission, the common objectives and joint responsibility for better regulation were fully recognised by the other institutions and in December 2003 the European Parliament, the Council and the Commission signed the interinstitutional agreement on 'Better Lawmaking'. The interinstitutional agreement regulates and clarifies all the interinstitutional aspects of the work on better regulation.

Before I turn to the specific issues raised by the present draft resolution, allow me to recall just two of the key initiatives of the Commission's action plan, which have also been integrated into the interinstitutional agreement. First, the Commission is implementing a framework for integrated impact assessment. 2004 will be the second transitional year during which this framework will be further consolidated and improved, while keeping a balanced assessment of economic, social and environmental impacts. Secondly, the action plan launched an ambitious effort to update and simplify the Community acquis, for which the Commission proposed a rolling programme in February 2003. This programme will be implemented in respect of the legislative procedures and the interinstitutional agreement.

The Commission welcomes the continued interest of the European Parliament in better regulation. The report prepared by the rapporteur, Mr Medina Ortega, focuses on the interinstitutional agreement on 'Better Lawmaking' and, in
particular, on the use of the alternative instruments of co-regulation and self-regulation.

The interinstitutional agreement establishes a framework for 'soft law' instruments that should facilitate their future use while fully safeguarding the competences of all Community institutions. In fact, the three institutions have, for the first time, established a common definition of co-regulation and self-regulation. Moreover, the institutions have agreed on general limits and conditions to the use of such instruments, defining the role of each institution in the process and ensuring that the prerogatives of the legislative authority are respected.

The Commission considers that the resolution is partly incoherent with the interinstitutional agreement and partly goes beyond the agreement. The Commission could accept some of the orientations, but only within the limits of the provisions already established in the interinstitutional agreement. Specifically, the Commission considers that paragraphs 5, 7, 8 and 9 of the draft resolution deviate from the word and spirit of the interinstitutional agreement and the limits and conditions laid down therein concerning co-regulation and self-regulation.

The Commission considers that at this stage the real challenge is the full and proper implementation of the broad range of commitments set out in the IIA. It would not be appropriate now to go beyond what was endorsed by all three institutions only a few months ago.

Rather than reopening the questions that have been settled by the interinstitutional agreement, the Commission invites the other institutions to implement the commitments made. For example, the interinstitutional agreement on 'Better Lawmaking' acknowledges the importance of simplifying Community legislation and commits Parliament and the Council, within six months of its entry into force, to modify their working methods by introducing, for instance, ad hoc structures with the specific task of simplifying legislation. These measures should, of course, fully respect existing Treaty provisions.

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Medina Ortega (PSE ), rapporteur . – (ES) Mr President, despite its brevity – it only has ten paragraphs of provisions and many recitals – my third report on simplifying and improving the regulatory environment is the result of reading many texts of at least ten years old.

The Commission believes that this third report goes further than what was achieved in the interinstitutional agreement. My report is not aimed against the interinstitutional agreement, but rather it intends to strengthen it. However, by means of the long discussion between Parliament, the Commission and the Council on the issue of improving the negotiation of Community legislation, myself and the Committee on Legal Affairs and the Internal Market, which approved the report unanimously, wish to express our concern at a tendency
which I would describe as technocratic in the legislative field.

The legislative process is a political one, it is a process of political decision-making. It is true that as far as possible we must prevent the drafting of legislation that is irrational, complicated and which can be improved on. But the emphasis on exclusively technical considerations or on the economic weight of a certain legislative measure may not correspond to the need to adopt a piece of legislation.

In other words, one of this European Union's faults is 'over-technification'. The European institutions have been criticised for being bureaucratic. I do not like the word 'bureaucratic'. I would say that what we have in the European institutions is a tendency to technify everything. And as a result of this technification we distance ourselves from the citizens thereby leading to their rejecting our form of adopting decisions.

On approving the interinstitutional agreement, I and the members of the Committee on Legal Affairs and the Internal Market stress the danger of creating a decision-making process which is entirely out of line with the will of the citizens. And the only means – however imperfect – the citizens currently have to express their point of view on the Community's contribution is the European Parliament elections.

If, for example, the European Parliament cannot oppose the technocratic procedures for adopting decisions by means of small groups in the form of self-regulation or co-regulation, I do not know what role it can play.

Mr President, I would like to reassure the Commission by guaranteeing that I, and this Parliament as well I believe, which I imagine will adopt my report without too many difficulties, do not intend to undermine the progress which has been made in terms of simplifying Community legislation, but rather propose strengthening the political elements of the process of adopting legislation, pointing out that legislative delegations must always be subject to the popular will, by means of an institution with full legislative competence.

As we know, the great difficulty is that the current Community legislation is the result of the accumulation of a series of international treaties which have continued to evolve and there will be no solution until a European Constitution clearly defining legislative powers is adopted.

Once clearly defined legislative powers exist, the legislative power will be able to delegate, will be able to transfer duties to technical bodies; but these technical bodies must never replace the popular will expressed by means of direct elections to a legislative institution – the European Parliament, Parliament and the Council, whatever you want to call it – which wishes to adopt those decisions.

I will therefore end by assuring the Commission that our intention is not to
undermine the interinstitutional agreement but rather to strengthen it, introducing the necessary political elements into it so that our citizens believe in the European construction we are carrying out.

Harbour (PPE-DE). – Mr President, I am here today speaking on behalf of all my colleagues in the Committee on Legal Affairs and the Internal Market, in particular my colleague, Mr Doorn, who has been the shadow rapporteur for the three successive reports that our hardworking rapporteur, Mr Medina Ortega, has produced.

In a way this is the end of the first phase of our cycle of work and, as the Commissioner said, we are now moving on to looking at further details of how to make the interinstitutional agreement work effectively. It is perhaps in that context we have the opportunity to make one or two remarks, rather than the specific points contained in this relatively short report. We have not really had enough debate in this Chamber about the whole issue of our role in better lawmaking or improving and simplifying the regulatory climate, as the Commission reminded us.

I would like to reflect on what my colleague, Mr Medina Ortega, said on the way in which we adopt decisions and the way in which regulation is developed and promoted within the European institutions. I agree with him that our citizens are genuinely concerned by the process. That is why they want us to do the job better and that is why those who are directly implicated in the process – whether consumers, citizens, or businesses, large and small – want to feel that they have been consulted and they have had their say at the right stage in the process.

One of the crucial elements of doing the job better is improved development of our legislative strategies and early consultation in the process. One of the most important features of the Commission's action plan is that it is essentially a two-step process. Before we move into the detail of the extended impact assessment there is also a stage for considering the whole strategy of the legislation, its objectives, a clear definition of those objectives, and the tools by which those objectives would be achieved. This might possibly be regulation, but there is no reason at that stage why some form of self- or co-regulation should not be considered as a proper option.

I know that my colleague, Mr Medina Ortega, is concerned about the way that self- and co-regulation develops, but I would argue that, if we consider that as a genuine alternative at the beginning of the process and see how it is integrated and that safeguards are built in and check it against the alternative of heavyweight and intrusive legislation, this can only be to the benefit of simplifying and improving the regulatory climate.

After all, we are looking for effective and efficient legislation. We are looking at outcomes. That is what we have just been discussing in connection with
enforcement because the problem is that, however much we legislate at European level, if we cannot have consistent enforcement, the cost of the legislation falls on people who already have the systems in place and are doing the job. It does not squeeze out those who are breaking the law. This works to the disadvantage of consumers – an issue that I know is at the core of your remit, Mr Byrne.

We should support this report, but this is only just the beginning of the process of working together with all the institutions to deliver what our citizens want, which is effective and efficient regulation or alternatives to regulation.

Koukiadis (PSE ). – (EL) Mr President, we know that our honourable friend, Mr Medina Ortega, has tremendous experience in this matter and, with his proposals to date, has helped a great deal with the job of simplifying and modernising the legislative work of the Community.

We have the interinstitutional agreement which the Commissioner talked about. However, I should like to ask this question: despite what we have today, can we say that we have a simple action plan with a specific hierarchy of objectives, with a specific timetable, with a proposal for specific measures for each objective and with a clearly defined procedure for measuring objectives? What interests us is to see quantifiable results in the wake of the interinstitutional agreement. With reference to the question, I ask you: are we in fact satisfied with the improvement so far in the quality of the regulatory environment? I do not think that we should reply in the affirmative because pioneering measures are missing.

In all events, and here I absolutely agree with Mr Medina, improving the regulatory environment means restricting the role of bureaucracy, for which the Commission is responsible. It also means rejecting the perception that efficiency or improvement go hand in glove with a reduction in democratic control. On these two issues, unfortunately, the Commission has not so far taken a clear stand.

Having said that, I should like to emphasise that we, the European Parliament, have a huge problem. Here we have to combine the cultures of 15 – and soon 25 – states and, of course, the freedom of proposal from all sides. We face the phenomenon of an exponential rise in the number of amendments and how they can be coordinated and how they can result in a homogenous and clear text, no one knows. We therefore also have an endogenous problem which we need to address, and here I am of the opinion that, to date, we have been lacking clear-cut services to take care of the technical aspects of legislation and help developments.

Nonetheless, the major problem remains the fourth stage in the overall regulatory framework, which is implementation. Unfortunately, even today, after so many reports on the implementation of law, a huge delay can be seen in
control by the Commission of the method of implementation and the judicial and administrative authorities do not have assimilation mechanisms and have not assimilated Community law. So this problem needs to be addressed if we want proper implementation of Community law.

Gargani (PPE-DE). – (IT) Mr President, I will take as a starting point the final words of the rapporteur, Mr Medina Ortega, who quite rightly said that the proposal under discussion and the whole of his report is not against the Commission but, if anything, seeks to harmonise – and I believe that, on this occasion, this term is more apposite than ever before – and regulate better law-making. As the coordinator of the parliamentary committee that reached an agreement on simplification of legislation (this interinstitutional agreement), I must say something about the importance of the debate that went on in my committee, the Committee on Legal Affairs and the Internal Market, on the report by Mr Medina Ortega. This debate began before we worked on the interinstitutional agreement and continued afterwards. The report which we are talking about was, therefore, a prerequisite for, and a consequence of, this interinstitutional agreement, which, had it been followed – please confirm this to me, Mr President, ladies and gentlemen – by the European Constitution, we would, I believe, have had a parliamentary term characterised by this strong connection and this desire to take into account the three institutions (Commission, Council and Parliament) around which Europe really revolves: the European Community.

I agree that the interinstitutional agreement is of course not everything: an agreement that prepares for a completely different role for Parliament, it is an agreement that must move forward. This is why, quite rightly, the rapporteur states that, in improving community legislation, it is necessary to go beyond the interinstitutional agreement. The interinstitutional agreement is, therefore, a condition, above all of the right to be consulted automatically – as Mr Medina Ortega rightly states in his report – in the areas of coregulation and self-regulation, that is to say a condition of Parliament’s right to be immediately informed by the Commission and to once and for all suspend the application of any voluntary agreement that it has not accepted. I believe that these are the two points that give shape to this report and on which there could be a further agreement in the next parliamentary term, in order to lay the foundations for a balanced relationship between the three institutions that represent Europe.

IN THE CHAIR: MR FRIEDRICH
Vice-President

President. – The debate is closed.
The vote will take place today at 12 noon.

EC-Israel association agreement
President. The next item is the joint debate on the following four oral questions to the Commission on achieving the correct implementation of the EC/Israel Association Agreement:

- **O-0019/2004** – B5-0067/2004 by Mr Lagendijk on behalf of the Group of the Greens/European Free Alliance;

- **O-0021/2004** – B5-0068/2004 by Mrs Morgantini on behalf of the Confederal Group of the European United Left/Nordic Green Left;

- **O-0024/2004** – B5-0069/2004 by Mr Watson on behalf of the Group of the European Liberal, Democrat and Reform Party;

- **O-0025/2004** – B5-0070/2004 by Mr Sakellariou on behalf of the Group of the Party of European Socialists.

Sakellariou (PSE). – (DE) Mr President, I wish to move that the sitting be suspended until the Commission does us the honour of joining us in the Chamber.

President. Mr Sakellariou, I wish to move that the sitting be suspended until the Commission does us the honour of joining us in the Chamber.

Mr Liikanen cannot help it if his flight has landed late. He arrived at the airport on time, but his plane was delayed because of weather conditions, so it may be another ten minutes before he arrives. We must, however, avoid a situation in which instead of starting at 12 noon as scheduled, voting does not start until 12.15 or even 12.20. You are well aware that it is very irritating for honourable Members if voting starts late. I would suggest that we should give the floor to the first authors of the questions, as they are familiar with the subject, before the Commissioner joins us, and the Commissioner also knows what they wish to say. We can then continue once the Commissioner is with us, and he will be in a position to answer immediately. That is my suggestion.

Sandbæk (EDD). – (DA) Mr President, I should like to support the proposal not to begin the debate until the Commission is present. Certainly, some of us have written our speeches, but what we talk about will, however, also depend upon the Commission. Otherwise, we should not of course have needed to ask the Commission to come and report on anything at all. I would prefer that the first speakers respond to the Commission’s contribution, which will form the background to my own response too. I do not think that we can go ahead with the debate. We must wait for ten minutes. Anything else would be absurd.
President. We have a request then, an official request. Do you wish to pursue your request, Mr Sakellariou? We have a speaker in favour of that request. So what I wish to ask now is whether anyone is opposed to our suspending the sitting, anyone who is in favour of our continuing this debate even if the Commissioner may not arrive for five or ten minutes? Does anyone wish to speak against the request? It seems not. We need to vote on this then: could I please have a show of hands from those supporting Mr Sakellariou's request that we should suspend the sitting for ten minutes until the Commissioner arrives? Those against please? Are there any abstentions?

(The sitting was suspended at 11.05 a.m. pending the arrival of the Commission and resumed at 11.15 a.m.)

Lagendijk (Verts/ALE ). – (NL) Mr President, ladies and gentlemen, the European Union and Parliament have been squabbling for years over products from the territories occupied by Israel, which are wrongly being given the same preferential treatment as products from Israel itself. Israel does not want to make this distinction, but the European Union does. Politics lies at the heart of the debate. The European Union considers the occupation of the territories in question illegal, and that is why we have made such a problem of this matter. However, the debate, which is in essence political, risks being overrun by scores of practical and legal aspects. The problem, and the reason I am asking these questions now, is that the Commission and the Council, tired of years of squabbling, are now threatening to go along with current practice. This would legitimise an illegal practice, and Member States would lose the legal basis for continuing to make a distinction between products from Israel and those from the Occupied Territories. Hence, I have two questions for the Commission.

The first is: what steps does the Commission intend to take by November of this year, when a new Commission takes office, to put an end to the current practice, and when, precisely?

The second is: can the Commissioner guarantee that every decision he takes that could have an impact on the spirit, the letter or the practice of the Association Agreement will first be submitted to this Parliament for its opinion?

Boudjenah (GUE/NGL ). – (FR) Mr President, yesterday, on International Women’s Day, a group of Palestinian women were received here, at the initiative of my group. They spoke to us of their weariness and of their daily struggle to survive in the refugee camps. They spoke of their courage and of their undying and dignified longing for peace. In particular, they spoke of their expectations of the European Union.

As you will be aware, the last few days have been particularly murderous in the Gaza Strip. Fourteen Palestinians, three of them children, have been killed; dozens have been wounded, including Israeli soldiers, as if the announced
withdrawal from the zone had to be preceded by acts of destruction with increasingly irreparable consequences. Tomorrow, you are invited to meet Israeli pacifists. These so-called refuseniks have also courageously refused to participate in the occupation at the heart of the spiral of murder in which the Palestinian and the Israeli people are caught up.

Clearly, we are today considering in particular Israel’s violation of the rules of origin within the framework of the association agreement. It is impossible, however, not to consider at the same time all those other blatant violations committed on a daily basis in the Palestinian occupied territories. These violations are also a complete betrayal of the spirit of partnership enshrined in the agreement signed. Consequently, for those who want to believe in a just peace, the debates on the rights or wrongs of the application of this agreement are indicative of what has unfortunately been seen as a reprehensible excess of caution on the part of the European Union. One is obliged to recognise that Israel treats with derision Europe’s reprimands relating to violations of Article 2 on the respect of fundamental rights, as well as those concerning the rules of origin. Let us consider the rules of origin.

Since 1976, Israel has determined the origin of the products it exports without distinguishing between products originating within its territory and those originating in the territories occupied since 1967. In other words, there is no distinction between its products and those of its settlements. In this way, Israel has continually issued certificates of origin to products that are not eligible for preferential treatment according to Community law. Had it been committed by any other country, such a violation would doubtless have lead to stringent retaliatory measures. Due to Israel’s customs practices, however, it has thus far been impossible for Member States to prevent these preferential imports or to impose taxes. Neither did the Commission, at first, propose adequate measures to combat these practices. Subsequently, the Commission announced that it was going to get down to the task of coordinating the ineffective actions of the Member States. Then the Commission spelt out its position, a clear and lawful position. On 10 May 2001, Commissioner Patten stated in the House that, ‘preferential access to the Community market for exports from the Israeli settlements, the West Bank and the Gaza Strip constitutes a violation of the EC-Israel trade agreements’. The measures taken, however, have failed to put an end to this unlawful practice. Furthermore, the ongoing construction of that shameful wall can only exacerbate the situation. Olive and fruit trees have been uprooted before the villagers’ very eyes. Agricultural land has been rendered inaccessible to thousands of local inhabitants. Will this new illegal annexation lead to still more exports of products from these areas?

Last November, the European Union stressed before the EU-Israel Association Council the importance of resolving the problem of the rules of origin before any amendment of the protocol on these same rules. The Commission indicated that it has pursued these discussions with Israel since then. Nevertheless, the question still remains. I would like to ask you again, Commissioner, whether the Commission will accept a solution that does not require Israel to stop issuing
certificates of origin to products from its settlements within the framework of the association agreement. Will the Commission use the legal instruments available to it? The possibility of amending the agreement is now being put forward. If we accept this principle, however, and if Israel continues to violate the agreement, the European Union could forfeit all its rights to suspend the application of any part of this agreement in order to stop the violation. This would be unacceptable. It would amount to deliberately flouting international law. It would mean recognising Israel as the occupying power in the Palestinian Territories and recognising Israel’s practice of annexing and colonising them. Be that as it may, I would like to make it clear, once again, that it is absolutely essential to consult Parliament before the agreement is amended in any way. Will the Commission undertake to do so?

My conclusion is a general one. The European Union cannot continue to be complicit in the continuing occupation of the Palestinian Territories by Mr Sharon’s government, in the theft of the produce of the land, in the confiscation of profits and in the denial to the people of the means of their existence and their very survival. The 1995 agreement followed closely on the heels of the Oslo process. It was designed to be a contribution to the peace process. The situation today is totally different. What type of cooperation can we be talking about?

Boogerd-Quaak (ELDR). – (NL) Mr President, Commissioner, what we are discussing here is the 1995 Association Agreement. I have absolutely no objections to this agreement in itself. It contains fundamental standards and values that demonstrate respect and, in itself, we can support Israel as a democracy. That is not where the problem lies. What I find incomprehensible, however, and the reason I have asked these questions, is that the European Union has been allowing Israel to violate the rules of origin in the agreement for years. These rules of origin – this is child’s play for you, of course – state that Israel is not permitted to sell products from the Israeli settlements in the occupied Palestinian territories as though they originated from Israel itself; otherwise, the products from the illegal settlements would wrongfully benefit from favourable import duties in Europe.

As Mr Lagendijk said, this is a political matter. I also know that the European Commission addressed Israel in this matter and, in reply, was told of Israel’s adamantine position that it considers the settlements to be Israeli territory. European governments are not responding, and are thus acquiescing in the violation of the agreement that they themselves adopted. This makes us jointly responsible for the continuation of the policy of colonisation, one of the greatest obstacles to peace. This is the crux of the matter, in my opinion. We must not share responsibility for this.

Under the EC Treaty, the Community Customs Code and the Association Agreement, Member States are obliged to refuse to give preferential treatment to the import of products from the settlements. As the Commission and as guardian of the treaties, you must monitor Member States’ compliance with
These problems must be solved, and without delay, and so I ask the Commissioner whether he now genuinely intends to put an end to these matters and come up with a genuine legislative solution, so that a uniform verification procedure can be followed in the Member States. The Member States’ customs authorities will then be able to collect ordinary import duties for products from settlements without the importers being able to contest this.

This would seem to me an extremely neat solution: not for or against Israel; not for or against the Palestinians. The issue is merely that we do not want to be jointly responsible for the problem of settlements, and I ask, therefore, that you submit any solutions to Parliament.

Sakellariou (PSE). – (DE) Mr President, Commissioner, the problem of giving preferential treatment to exports from Israeli settlements in the West Bank and Gaza Strip has now been with us for nearly 30 years and has been the subject of regular oral and written questions and debates in the European Parliament. Most recently, in a debate in November 2003 we reaffirmed that a solution finally needed to be found in order to bring Israel's repeated violations of international law to an end.

Because of its practice of labelling products from the occupied territories as ‘Made in Israel’, Israel is not only violating the provisions on the territorial scope of the agreement, notably Article 83, the rules on origin and the provisions on cooperation and mutual assistance between administrative authorities in customs matters, but in doing so it is continuing to display its total contempt for international agreements and for international law.

The problem is, however, now more pressing than ever before. The European Union is planning to include Israel in the preferential treatment system of pan-European accumulation, which in this case means making corresponding changes to the EC-Israel Association Agreement. If that were to happen without the illegal application of the rules on origin for settlement products being corrected, it would imply de facto acceptance of such illegal application. The European Union would accordingly be permanently depriving itself of the right finally to insist on legal application of the rules for preferential treatment of exports.

The preferential treatment of export products from the occupied territories is, however, not only illegal and in breach of international law, it also means that the Member States continue to be faced with the thorny problem of controls and of achieving some degree of uniform treatment. Although the Commission has attempted to find a remedy, the problem has so far not been solved at all. The Commission has quite rightly informed the Israeli authorities that measures must be taken promptly to halt this illegal practice.
Before there can be any further talk about amending the EC-Israel Association Agreement, I would like to call upon the Commission, as a matter of urgency, to resolve this situation before the end of its term of office. This is a very important issue, Commissioner, because it needs to go hand in hand with the amendment of the Association Agreement. The Commission should consult Parliament on this and thus prevent a situation arising, through inaction and a lack of political will, in which illegality is de facto legalised.

Liikanen, Commission. Mr President, under the terms of the EU-Israel Association Agreement that agreement applies solely to the territory of the State of Israel. Therefore, products originating from Israeli settlements in the West Bank, the Gaza Strip, East Jerusalem or the Golan Heights are not entitled to preferential tariff treatment upon entry into the EU, and any claims of preferential origin made by Israel for such products cannot be accepted by the Community's customs authorities.

The Commission has explained in detail, for example in replies to various oral questions in May and November 2003, its position on this issue and the actions it has taken. The EU is taking every opportunity to find a solution to the problem of product imports from the Israeli settlements in question. Exploratory talks aimed at finding possible solutions have recently been held between the Commission and Israel, but these discussions have yet to lead to a formal proposal by Israel and the Commission therefore has yet to take a position. However, the Commission will not accept any solution that would mean preferential tariff treatment being granted for products originating from the Israeli settlements and imported under Israeli rules of preferential origin.

As regards the involvement of the European Parliament, I can confirm that the Commission will act in full respect of the framework agreement on relations between the European Parliament and the Commission.

Laschet (PPE-DE). – (DE) Mr President, ladies and gentlemen, the issue that we are discussing in connection with this agreement between the European Community and Israel is more than just a technical one. It is not just about the legal arguments that have been exchanged with the authors of the four questions during this debate; what is really important is the political issue of whether we wish to promote peace at this point or not. It goes without saying that the occupation of the occupied territories since 1967 is illegal – that is the position of the United Nations. Resolution No 242 says that Israel should withdraw to its pre-1967 borders.

This debate has now been going on for over 30 years. During that time, settlements have been built, and the signing of the Oslo Peace Accord has brought the two sides closer together. So the question now is this: what will most assist the peace process? For example, would immediate withdrawal from the occupied territories really serve the cause of peace? Everyone – including
We need to remember this: the agreement was concluded in 1975, the Oslo Peace Accord was signed in 1993, and from that moment on the European Union has supported the independence of the Palestinian Autonomy Authority, it has given it over EUR 2 billion and has done very good work. In Oslo both partners agreed that both areas, the different zones, including the Autonomy Authority, were parties to trade with the European Union. So regardless of whether the settlement policy is right or wrong, the area in which the settlements are located is an EU partner, either through the agreement with the Palestinian Autonomy Authority or through the EC-Israel Association Agreement.

The comments made by the honourable Member from the political left who spoke first are therefore spurious. No one on the Palestinian side is exploited through the Association Agreement. Quite the opposite: if we were to suspend it overnight, the Palestinians who work there would be the first to suffer again. It is not just settlers who manufacture products there; a good many Palestinian jobs also depend on it. I think that the Commission's position is very well balanced in making it clear to Israel that this does not imply any recognition of the occupied territories, but that solutions still need to be found, so that an agreement of this kind is made to work and so that we do not pour oil on the fire again. I welcome the fact that Israel is once again handing over to the Palestinians the tax and customs due to them, and we in the European Union should not give the wrong signal and suspend the agreement as some people have suggested. That would certainly not help the peace process.

Napoletano (PSE). – (IT) Mr President, Israeli Government circles are continuing to fuel a political campaign aimed at representing the position of the European Union and the institutions as unbalanced and, therefore, geared to sympathising with, and supporting, the rights of the Palestinian people rather than those of the Israelis. All this is wrong, and it is a fact that Israel has occupied Palestinian territory since 1967 and that the European institutions, including this Parliament, have repeatedly called on the State of Israel to respect the rules of international law.

The European institutions’ basic preference was for a constructive partnership, with the hope of attaining the best results by going along this road. As long as there are forces such as those that created the Geneva agreements, we must continue to foster this hope and invest politically in this future possibility.

In fact, since 1995 the EU-Israel partnership has developed within the framework of an association agreement that provides, amongst other things, for preferential treatment of Israeli products on the European market. Since 1976
Israel has, however, determined the origin of its products without making any distinction between those from its territory and those from the territories occupied in constant and repeated violation of Community law, international law and the Geneva Convention.

Today we are at a critical point in this affair. In fact, the protocol on the rules of origin is also being modified to allow for, on the one hand, pan-European enlargement and, on the other hand, for an Israeli-Jordanian trade system. Is it possible, however, to imagine this enlargement without having resolved the serious dispute with Israel? In 2000, the Council reaffirmed the need to respect international law under the Fourth Geneva Convention in trade relations with Israel. In 2001, Commissioner Patten described the continued exports from the settlements on a preferential basis as violations. In 2003, the Council decided to reach a bilateral agreement with Israel. At this point, Commissioner, I wanted to ask you three questions, but given your reply, I will ask two. The first is that it seems to me that you said that the Commission cannot accept any agreement that does not provide for this illegal practice to stop; yet, how does the Commission intend to tackle this debate with the Council, given that it seems that some Member States are not of the same opinion? Finally, is the Commission prepared to consult Parliament before taking any decisions in this area?

(Applause from the left)

- Nordmann (ELDR ). – (FR) Mr President, only a small proportion of Israeli exports come from the settlements. The figure is definitely under 5%. All the attention paid to this issue reflects the strong anti-Israeli sentiments of certain speakers. It is important to set the debate in context and bear in mind that the Oslo accords provide for unified customs arrangements.

The real question, therefore, is whether certain products are to be identified in a particular way. The Israelis seem ready to accept this. Negotiations leading to an arrangement of this type will certainly resolve this problem, which is actually a relatively minor one. Regarding the establishment of a special category, I believe that 60 years after the liberation of Europe, we must still guard against imposing a new yellow Star of David, even if it is only to apply to goods.

- Turchi (UEN ). – (IT) Mr President, in my opinion, the whole of this debate goes against the history, culture and identity of the European left wing. Why are we talking about such an issue, for what reason? We are not talking about something in order to contribute to the peace or to bring the sides to the table, but rather we are talking about a legal loophole with no repercussions, not even economic. What will this lead to? What should we do tomorrow morning with the new labels? Do you think, then, that tomorrow morning there will really be a major violation of international law on this matter? Or, should we then talk about the violation of international law in the form of the claims made by Abu
Ali in our institution a few days ago, when he defined Hamas as a normal and
general political force, rather than as a factor contributing to international
terrorism? That constitutes a violation of international law and not a debate on
subjects of this nature. Furthermore, the hard-fought-for settlements that have
been brought to the table so often in this discussion about associated products
are not helping to put an end to peace, that much is certain. It is certainly
terrorism that prevents the parties from coming to the negotiating table. Now we
are talking about something serious. I say to everyone: let us contribute to
peace. I say to the Commission: let us not make absurd allegations when
discussing this, when we still have to clarify the issue of funds allocated for
humanitarian aid: where did they really go? I believe that when we start to
discuss legal matters in this House, the dialogue ends; or we hide behind legal
pretexts. So then, let us avoid this.

Sandbæk (EDD). – (DA) Mr President, it is quite incredible that the
Commission has still not found a solution to the issue of the export from Israel
of goods with preferential access and that, knowing how Israel has so far
insisted upon its own interpretation of its own area, the Commission wants now,
into the bargain, to leave it to Israel to propose a solution enabling the Member
States to identify which goods have been produced in the illegal settlements, so
that duty can be claimed on them.

If we continue not to claim duty on goods from the occupied territories, we have
de facto recognised Israel’s occupation of them, and that is something that, as
the EU, we cannot do. Moreover, the EU has a duty to comply with its own
trade agreements and, unless Israel very quickly comes up with a proposal that
makes this possible, I think that the only solution to this issue is for the
Commission to inform the Member States that they must subject all Israeli
certificates of origin to a verification procedure.

Pannella (NI). – (IT) Mr President, Commissioner Liikanen, ladies and
gentlemen, I must admit that not just in Mr Turchi’s speech, with which we
certainly agree, but also in the speeches by Mrs Morgantini and Mr Laschet, I
detect a different mood from what we have seen to date. The Commissioner’s
speech is a speech that I would say, automatically to some extent, confirms the
Commission’s position. I fear that the Commission would have said the same if
we had been discussing the situation in Vietnam, and would have done so on the
basis of its usual course of action, that is to say one whereby, instead of
monitoring rights and the law, it would have monitored and protected relations
with Vietnamese power, murderous as this was.

Today, however, it seems to me that the Commission’s tone is to some extent
justified by the very reasons stated by Mrs Morgantini and others. The desire to
narrow the focus within the framework of a complex situation that is slipping
from our grasp is, I believe, an error of method. What I detect is not a love of
the truth, but passion of the kind exhibited by the French Communist Member,
who speaks about the wall of shame. There are many scandals which your party, which has been silent up until 2004, should denounce.

Ladies and gentlemen, at the end of this parliamentary term, the real problem – and I am winding up here – is the fact that we continue to forget that the historic reasons that allowed us to make the progress that we have made in Europe to date have their origin in the statement – excellently summarised in the Ventotene Manifesto by Altiero Spinelli – according to which the self-contained nation state cannot produce democracy, freedom, progress or truth. It is by imagining that it can that we continue, for example, mistakenly to posit the national State of Palestine as the problem we have to resolve on behalf of the Palestinians and the Israelis. I believe that Israel too is lacking in imagination, strength and rigour in this area. The Israeli parties too are like yours; they are European. I would like to conclude by saying: let us hope, at the end of this parliamentary term, that the federalist ideals and the federalist method will very quickly prevail, with the accession to the European Union of Israel and of a Palestinian state of the kind you want to see: one founded on freedom and not on the abuse of power.

Bremmer (PPE-DE). – (NL) Mr President, as the debate has shown, this is a complicated and sensitive subject. I agree with the previous speakers in this respect, in particular my colleague Mr Laschet.

Clearly, serious questions arise about preferential access to the Community market for products originating from the Israeli settlements in the West Bank and the Gaza Strip. As far as I understand it, the preferential import from these territories constitutes a violation of Community law. Now I understand that the European Union wants to amend the Association Agreement with Israel with the addition of a pan-European cumulation of origin, and also the implementation of Jordanian-Israeli cumulation of origin. The question is, however, whether a cumulation system such as this is even possible without a solution to this problem of the preferential import of products from the Occupied Territories.

In my opinion, it is of the utmost importance that the European Parliament be consulted in good time before any part of the existing agreement is amended. I agree with the previous speakers: it is important that this take place before the end of the present Commission’s term of office, if possible.

We set great store by a clear explanation of these problems by the Commission. Does the Commission envisage possibilities for resolving the problems that have arisen with Israel within a reasonable time? I thank the Commissioner for his initial response and look forward to his second.

As the previous speaker remarked, this is indeed a measure that is neither for nor against Israel.
Menéndez del Valle (PSE). — (ES) Mr President, we are facing an absurdity, a paradox. We are discussing the legality and legitimacy of products originating from entities, the settlements, which international law considers to be illegal. Established by military force in occupied territories, the withdrawal from which the European Union, the United Nations, the United States, and practically the entire international community consider to be essential in order to create a viable Palestinian State able to live in peace alongside the State of Israel.

With regard to the issue on which this debate is based, achieving correct application of the EC-Israel Association Agreement, I do not mind what is done nor how it is done and I do not mind what law is applied nor how. But it must be made clear that Israel cannot continue to unilaterally apply the Association Agreement to settlements which must disappear in order for peace to be possible.

To allow this to continue in a unilateral fashion would be another absurdity, an insult, a humiliation which this Parliament at least must combat.

This is not the time, and nor do I have the time, to once again condemn the Sharon Government’s lack of political will to achieve peace. It is sufficient at this point to insist on the issue which we are dealing with this morning, and that is that the Israeli Government cannot issue proof of origin to products which, in accordance with Community law, are not eligible for preferential treatment as a result of originating from the colonies established in the occupied Palestinian territories.

We must remember once again the Commission’s clear statement of 10 May 2001 that exports from Israeli settlements in the West Bank and Gaza, within the framework of preferential treatment, are violations of the commercial agreements between the Community and Israel.

If only for tactical reasons, it would do no harm to remember that on 10 April 2002 this Parliament approved a resolution on the Middle East, paragraph 8 of which calls on the Commission and the Council to suspend the Euro-Mediterranean Association Agreement between Israel and the European Community.

(Applause)

Lucas (Verts/ALE). — Mr President, it is clear that if EU law is to be credible it should be enforced properly. Under the Geneva Conventions the Occupied Territories are not part of Israel and, therefore, products from the settlements cannot be considered covered by this agreement. If the Commission is going to come forward with new plans – as it should – then it should do so before Parliament rises in June to give us time to scrutinise them properly.

However, I agree with those who say that it is time to look at wider measures to
do with suspending this EC-Israel association agreement, because that agreement contains an important human rights clause that states that if there are human rights abuses on either side of the agreement, then that agreement should be suspended. The EU prides itself on inserting these human rights clauses into trade agreements. However, if they are there we have to act on them – they have to be credible. Therefore it is time to suspend this agreement, because of not only the human rights abuses associated with the settlements but also those associated with the new apartheid wall, which has nothing to do with security and everything to do with an illegal land grab. It is destroying lives and livelihoods. If the EU does not suspend this agreement, it is guilty not only of an injustice to the Palestinian people but also of undermining its own laws and legislation.

Pannella (NI). – (IT) Mr President, quite right, I made a totally ridiculous remark and I would like to correct it immediately. I had thought and imagined that Mrs Morgantini could speak like Mrs Napoletano. I apologise, Mrs Napoletano, and let us attribute to Mrs Morgantini what she said. She continues to portray the war, from which we want to pull out, from a point of view that I do not agree with.

President. An example of Italian grandezza, elegance and courtesy.

Belder (EDD). – (NL) Mr President, I hope to give an example of Dutch common sense. On 4 September 2003, this House was already debating the proper application of the EC-Israel Association Agreement. On that occasion, I quoted the conclusion of the Dutch Foreign Minister that ‘in the case of most of the products that carry Israeli proof of origin, the Netherlands can assume that the conclusions by Israeli customs regarding their origin have been reached in a lawful manner. This means that they meet all the conditions of the rules of origin protocol’.

Last year, I asked the Commission whether it could subscribe to this conclusion from the Hague for the other EU Member States too. No answer came at that time. Perhaps today’s representative of the Commission will be rather more forthcoming. I shall not lose heart, however, and shall ask a second question. Is the demanding of additional customs duties from importers of products presumably originating from Israeli settlements a unilateral policy? What is the Commission’s view on this?
Gutiérrez-Cortines (PPE-DE). – (ES) Mr President, I am surprised that, since Commissioner Liikanen has said that the European Union is going to rigorously apply the rules in force, we should have any doubts about the review of the agreement with Israel which is taking place at the moment.

I have no reason to doubt that the rule will be applied, but I do very much doubt whether this Parliament – or a minority within it – wishes to promote peace between the Palestinian Authority and Israel. I have always been convinced that, if we want peace, we cannot play at being the bad guys and constantly penalise one of the parties. If we want to have credibility, we should play positively, and if we want to replace or, at least, compensate for the influence of the United States – which many here talk about – over Israel, and if we want Israel to trust in Europe, what we cannot do is always seek to castigate.

If the occupied territories are soon – and we hope this is the case – going to pass into the hands of the Palestinian Authority, why leave them in ruins? Why ruin them? Because there is a lot of falseness here. The Palestinian area does have a preferential system, just like the Israeli area. The problem is that there is this contradiction, this illogicality, that this territory is both Palestinian and Israeli, as the Israelis believe.

We must seek points of agreement, we must seek peace. We must be credible to the Israeli people, and I do not believe we are going to achieve that through a ‘scorched earth policy’. Furthermore, with a policy of this type, subsequent investment by the Palestinians in order to incorporate these territories will be much greater. So I would repeat, why do we not seek points of agreement? Why does Europe not stretch out its hand to Israel? I must repeat that I do not understand why we do not do so.

(Applause from the right)

Maes (Verts/ALE). – (NL) Mr President, Commissioner, products from the Occupied Territories are, according to the Association Agreement, not Israeli products. That is how we need to view this dossier. It is symbolic, and symbols are important in issues of war and peace, especially now. The wall that Israel is now erecting is more than a symbol. It has nothing to do with preventing terrorism, but everything to do with denying the Palestinians the water and water resources on which they rely for their agriculture and for surviving in their villages. The right to water is a human right, and because this human right is being violated, together with other human rights, I am asking for this Association Agreement to be suspended.

Liikanen, Commissioner. Mr President, I will make a few general remarks followed by replies to specific questions.

The Commission takes every opportunity to reach a satisfactory solution to
ensure correct application of Community law and to protect the Community's own resources. That is why the Commission works in close cooperation with the customs authorities of Member States and maintains a constructive dialogue with the Israeli authorities. This approach is generating results; duties are being recovered on goods from the settlements. Somebody asked where the customs duties go. They go to the general revenue side of the Community budget. Israel is willing to cooperate to reach a satisfactory resolution.

Finally, I want to remind you that EU policy towards Israel lies in partnership and cooperation. A specific question was raised about amendment of accumulation of origin. I want to reiterate the statement of the Association Council last November, recalling that in July 2003, at the third Euro-Mediterranean ministerial meeting, ministers endorsed a new protocol on rules of origin which allows the extension of the pan-European accumulation of origin to the Mediterranean countries. The next stage will be amendment of origin protocols in the current bilateral association agreements in order to insert the changes necessary for the application of diagonal accumulation.

I particularly want to emphasise that the EU notes Israel's support for this project. The EU stresses the importance of solving the bilateral issue of rules of origin before the original protocol is amended. The EU’s position is clear.

President. Thank you very much, Commissioner Liikanen.

The debate is closed.

IN THE CHAIR: MR COX
President

Vote

President. The next item is the vote. (1)

Report (A5-0117/2004) by Giuseppe Gargani, on behalf of the Committee on Legal Affairs and the Internal Market, on the proposal for a European Parliament and Council directive on waste (codified version)

(Parliament adopted the text)
Report (A5-0085/2004) by Giuseppe Gargani, on behalf of the Committee on Legal Affairs and the Internal Market, on the proposal for a European Parliament and Council directive on the approximation of the laws of the Member States on extraction solvents used in the production of foodstuffs and food ingredients (codified version)

(Parliament adopted the text)

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Report (A5-0086/2004) by Giuseppe Gargani, on behalf of the Committee on Legal Affairs and the Internal Market, on the proposal for a European Parliament and Council decision concerning the activities of certain third countries in the field of cargo shipping (codified version)

(Parliament adopted the text)

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(Parliament adopted the text)

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Report (A5-0087/2004) by Herbert Bösch, on behalf of the Committee on Budgetary Control, on the proposal for a European Parliament and Council decision establishing a Community action programme to promote activities in the field of the protection of the Community's financial interests

(Parliament adopted the text)

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Before the vote:
Mulder (ELDR), rapporteur. – (NL) Mr President, the first amended budget for 2004, which is to be voted on shortly, relates to the accession of the new Member States on 1 May this year. The Committee on Budgets has already approved this budget unanimously and, in principle, Parliament as a whole rubberstamped everything as long ago as December last year. For legal reasons, we now have to make this official, which can be done presently. I should like to point out that the observers in the Committee on Budgets have played a very active and constructive role in drawing up the budget with regard to the new countries, and we as the Committee on Budgets have increased certain payment appropriations. Some people in the Council always think that Parliament is too generous when it comes to money and has, so to speak, a hole in its pocket. I should like to draw your attention to the fact that with the enlargement through the accession of ten new countries, the percentage of the gross national income that is spent on the European budget is 0.98%, the lowest percentage since 1990. This leads me to think that Parliament is good with money. If you will be voting ‘yes’ – and I hope that you will do so in large numbers – then nothing will stop us financially from including all new Member States in the European Union on 1 May of this year.

President. Mr Mulder, we would never have expected a Dutch rapporteur to have a hole in his pocket!

(Parliament adopted the text)

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Report (A5-0073/2004) by Neena Gill, on behalf of the Committee on Budgets, on Draft Amending Budget No 2/2004 of the European Union for the financial year 2004 – Section VIII(B) – European Data Protection Supervisor

(Parliament adopted the text)

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Report (A5-0069/2004) by Reimer Böge and Joan Colom i Naval, on behalf of the Committee on Budgets, on the proposal for amending the financial reference amount – within the meaning of the interinstitutional agreement of 6 May 1999, Article 34(3) – of the sixth framework programme of the European Atomic Energy Community (Euratom), in order to take account of enlargement

(Parliament adopted the text)

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Report (A5-0066/2004) by Mr Böge and Mr Colom i Naval, on behalf of the Committee on Budgets, on the proposal for a decision of the European Parliament and of the Council amending Regulations (EC) No 2236/95, (EC)

(Parliament adopted the text)

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(Parliament adopted the text)

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(Parliament adopted the text)

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Report (A5-0100/2004) by Marjo Matikainen-Kallström, on behalf of the Committee on Citizens’ Freedoms and Rights, Justice and Home Affairs, on the initiative of the Kingdom of Spain with a view to adopting a Council Act establishing, in accordance with Article 34 of the Treaty on European Union, the Convention on the suppression by customs administrations of illicit drug trafficking on the high seas

Before the vote:

Turco (NI). – (IT) Mr President, the minority opinion that was delivered, in accordance with procedure, in the Committee on Citizens’ Freedoms and Rights, Justice and Internal Affairs does not appear in the Matikainen-Kallström report on the suppression of illicit drug trafficking. I would therefore ask that this minority opinion that does not appear in the final text be reinstated into the
President. Let me check the committee record, but if it was adopted by the committee, then it will be published.

(Parliament adopted the text)

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Report (A5-0099/2004) by Patsy Sörensen, on behalf of the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs, on the proposal for a Council Directive on the residence permit issued to third-country nationals victims of trafficking in human beings or to third-country nationals who have been the subjects of an action to facilitate illegal immigration who cooperate with the competent authorities (Renewed consultation)

(Parliament adopted the text)

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Report (A5-0108/2004) by Maurizio Turco, on behalf of the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs

1. on the initiative of Ireland with a view to adopting a Council Act amending Europol's staff regulations

2. on the initiative of Ireland with a view to adopting a Council Decision adjusting the basic salaries and allowances applicable to Europol staff

3. on the initiative of Ireland with a view to adopting a Council Decision adjusting the basic salaries and allowances applicable to Europol staff

Before the vote:

Turco (NI), rapporteur. – (IT) Mr President, I simply wanted to recall that since 1996, with the Nassuer report, this Parliament has rejected all the Council proposals concerning Europol, because the Council does not agree to communitarise Europol and to finance it with the Community budget. This has led to Europol not being subject to any control, whether democratic or jurisdictional. Given that the Council is not here and that the Committee on Citizens’ Freedoms and Rights, Justice and Home Affairs is calling, as it has already done, for the Council proposal to be rejected in accordance with Rule 68(3) of the Rules of Procedure, I ask that we immediately proceed to vote on the proposal.
President. Mr Turco, I take note of your suggestion.

(Parliament adopted the legislative resolution)

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Report (A5-0109/2004) by Sir Neil MacCormick, on behalf of the Committee on Legal Affairs and the Internal Market, on the Commission communication on better monitoring of the application of Community law

Before the vote:

MacCormick (Verts/ALE), rapporteur. – Mr President, scarcely less important than passing wise laws is seeing that they are actually implemented and it is, therefore, encouraging to read the Commission's report, which my report addresses.

However, as my report suggests, there is a real problem about the non-compliance with Community law among big states. The worst example – which is cited in the explanatory statement – concerns the treatment by the Italian State of a group of university lecturers, who, after 14 years, have still not had their rights enforced, despite two resolutions by this House. I have just received information that, despite the European Commission's decision to ask the European Court of Justice to impose fines of EUR 309,750 a day, the Italian Parliament has just passed legislation which enhances the illegal discrimination against these citizens. I find this outrageous. I hope the House will support my report.

(Applause)

(Parliament adopted the text)

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Report (A5-0097/2004) by Gerhard Schmid, on behalf of the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs, with a proposal for a European Parliament recommendation to the Council on cooperation in the European Union on preparedness and response to biological and chemical agent attacks (health security)

(Parliament adopted the text)

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Report (A5-0104/2004) by Marco Cappato, on behalf of the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs, on the first report by the
Commission on the implementation of the directive on data protection (Directive 95/46/EC)

Before the vote:

Mr President, I just wanted to ask you and all of us what good the privacy rules are, if even as the European Union we allow them to be completely disregarded. My report does not propose amending legislation on privacy, because there is no problem with the legislation, but with its application. One example that many of you are familiar with: for a year the European Union and the Member States have allowed the United States security services access to booking terminals for transatlantic flights, with no information, authorisation or control. Therefore, many of us get annoyed with the United States when in reality the problem lies with the rules we have and could and should ensure are respected, but which we do not enforce, and Commissioner Vitorino has disclosed that we will shortly be setting up a European system to do the same thing. We can therefore see why we do not enforce the rules: because we are already preparing to adopt those mechanisms which infringe privacy.

I therefore hope that we will unanimously vote for a report condemning these situations. The problem is that when it comes to having recourse to the Court of Justice and enforcing the rules, the European Commission, Member States, privacy protection authorities and, I am afraid, also Parliament, prove to be extremely weak and inadequate.

President. Mr Cappato, the issue to which you refer – the passenger name records system and data exchange with the United States – will be expressly dealt with under the Boogerd-Quaak report on Wednesday of the next part-session.

(Parliament adopted the text)

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(Parliament adopted the text)

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Recommendation for second reading (A5-0083/2004) by the Committee on Women's Rights and Equal Opportunities, on the Council common position for
adopting a European Parliament and Council decision adopting a programme of Community action (2004-2008) to prevent and combat violence against children, young people and women and to protect victims and groups at risk (the Daphne II programme) (rapporteur: Lissy Gröner)

(The President declared the common position approved as amended)

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Report (A5-0071/2004) by Giorgos Dimitrakopoulos, on behalf of the Committee on Constitutional Affairs, on the amendments to the European Parliament's Rules of Procedure following the adoption of the Regulation governing the statute and the financing of political parties at European level

(Parliament adopted the decision)

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Report (A5-0068/2004) by Richard Corbett, on behalf of the Committee on Constitutional Affairs, on the restructuring of Parliament's Rules of Procedure in the light of its resolution of 12 June 2002 and the minor changes which have become necessary since then

Before the vote:

Hernández Mollar (PPE-DE). – (ES) Mr President, I would simply like to tell the House that, in agreement with Mr Turco, there is a correction to the explanatory statement.

Corbett (PSE), rapporteur. – Mr President, I just want to reassure the House that this is largely a tidying-up exercise.

(Laughter)

However, it will, at the same time, provide us with a new ordering for our Rules of Procedure; it will plug a few gaps and deal with a few technicalities that have been spotted and it will allow the newly enlarged Parliament to have a new set of Rules that has been adapted for enlargement, not least pursuant to Rule 180(8).

Frassoni (Verts/ALE). – Mr President, the report's title is misleading. I would like to say to colleagues that one of the amendments to be voted in relation to the Corbett report proposes a rule that makes it very hard to set up temporary
committees. This applies to the second vote, so be careful what you do, colleagues.

I know it is very late, but please take into account that this will mean that good work such as that carried out in this Parliament on the Prestige issue would not be possible if we were to adopt this amendment.

President. There is a separate vote on that amendment. This is voting time, not a debate!

(Parliament adopted the decision)

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Before the vote:

Schnellhardt (PPE-DE). – (DE) Mr President, we are voting on the Paulsen report today. It was only this morning that the amendments to this report became available in all languages. I regard this as a very important report and there are a great many amendments. I am not in a position to adopt a clear position on this report today, and I therefore request that the vote should be postponed until tomorrow.

Roth-Behrendt (PSE). – (DE) Mr President, we have been in a position to discuss Mrs Paulsen's report since last week. The Council has not given us any indication that it still thinks there is any room for manoeuvre. I therefore see no reason for postponing the vote today. We are well prepared and we also want to vote today.

Paulsen (ELDR) rapporteur. (SV) Mr President, I think that we are voting now. We have had an opportunity to debate, and I have had close contact with the shadow rapporteurs and the groups that have been interested in contact.

President. What is the opinion of the chairman of the committee, Mrs Jackson?
Mr President, the only observation is that if you postpone this vote today, you will run into the problem that my committee will be producing an avalanche of reports in the future, so it might be as well to deal with it now.

(Parliament rejected the request to postpone the vote)

(Parliament adopted the legislative resolution)

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Report (A5-0468/2003) by Janelly Fourtou, on behalf of the Committee on Legal Affairs and the Internal Market, on the proposal for a directive of the European Parliament and of the Council on measures and procedures to ensure the enforcement of intellectual property rights

Before the vote:

Mr President, I wish to raise a point of order touched on in the debate this morning. It concerns declarations of interest in this House where an interest is a familial one rather than a direct personal one. This has been the subject of various newspaper articles, including a leader in the London Times – which at least used to be a serious newspaper.

Mrs Fourtou has behaved with extreme honour and goodwill throughout, but has been put in the invidious position of bringing forward a report and then being accused of not having declared an interest. We must have clarity as to whether and when familial interests have to be declared.

(Applause)

Mr President, I should like to comment on what Mr MacCormick said. The European Ombudsman has asked the Commission to carry out an investigation for the purpose of clarifying these financial declarations. I would ask the Commission to reply to the European Ombudsman, for matters are as Mr MacCormick described. There are things that are extremely unclear, and these must be clarified when the new Parliament meets. I would ask the Commission to reply to the Ombudsman’s enquiry about the same issue.
President. Mr MacCormick, you have raised a valid question, which I will bring to the attention of the Bureau, irrespective of what the Commission or other institutions may choose to do.

Before the vote on Amendment No 83:

Cappato (NI ). – (IT) Mr President, I wish to point out a linguistic problem with Amendment No 83 before the vote. The English version says ‘seizure of the infringing goods’. The Italian version says ‘seizure of the contentious goods’. Therefore the English version refers to goods which are illegal, and the Italian version refers to those which could be illegal. I do not feel we should add, in the hasty way with which we have been forced to act by the procedure followed, a further restriction to measures which already appear restrictive enough. The same goes for ‘judicial authorities’, which in English means judges who pass judgment, whereas in Italian, it can also refer to investigating judges. We should therefore clarify whether we are also conferring powers of investigating judges, which I hope is not the case, or only powers of adjudicating judges. All these issues, without the rush, which we would have had to ...

(The President cut off the speaker)

President. We will make sure that all language versions conform to the English text, which is the original.

Before the vote on Amendment No 53:

Echerer (Verts/ALE ). – (DE) Mr President, I too would like to say, in relation to Amendment No 53, that the English version is the valid text. ‘Parasitic copies’ is therefore the correct wording.

President. I take note of that. Once again, we will ensure that all language versions correspond to the original text.

(Parliament adopted the legislative resolution)

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the Member States relating to electromagnetic compatibility

(Parliament adopted the legislative resolution)

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(Parliament adopted the legislative resolution)

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Report (A5-0095/2004) by Arie M. Oostlander, on behalf of the Committee on Citizens’ Freedoms and Rights, Justice and Home Affairs, on the proposal for a Council framework decision laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of drug trafficking (Renewed consultation)

(Parliament adopted the legislative resolution)

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Before the vote:

Von Boetticher (PPE-DE), rapporteur. – (DE) Mr President, ladies and gentlemen, the Council intends to establish a border protection agency. This House has developed an alternative model, but we all know that the Council will disregard it. Above all, I would like to draw the attention of the members of the Committee on Budgets to the fact that this agency, in addition to the 27 staff working there, is also to be controlled by 27 members of the Management Board and also by an Executive Board consisting of five members. The Commission and the Council really are creating a bureaucratic monster here! I wish to ask the Committee on Budgets, before it approves the funding for this agency, to enter into a further in-depth discussion with the Council. No matter how much we support progress in this field, we simply cannot work like this in Europe. I hope
the Committee on Budgets will back us on this.

(Applause)

(Parliament adopted the legislative resolution)

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Report (A5-0092/2004) by Regina Bastos, on behalf of the Committee on Women's Rights and Equal Opportunities, on reconciling professional, family and private lives

Before the vote on Amendment No 2:

Bastos (PPE-DE), rapporteur. – (PT) Mr President, there is an arrangement with the Socialist Party that Recital G should be deleted and that it should be part of a package including Amendment No 7. Now that Amendment No 7 has been approved, the deletion of Recital G should be approved.

President. – Indeed, Amendment No 2 proposes that Recital G be deleted.

(Parliament adopted the resolution)

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Report (A5-0102/2004) by Elena Valenciano Martínez-Orozco, on behalf of the Committee on Women's Rights and Equal Opportunities, on the situation of women from minority groups in the European Union

(Parliament adopted the resolution)

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Report (A5-0055/2004) by Karin Junker, on behalf of the Committee on Development and Cooperation, on population and development: 10 years after the UN Conference in Cairo

(Parliament adopted the resolution)

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Report (A5-0118/2004) by Manuel Medina Ortega, on behalf of the Committee on Legal Affairs and the Internal Market, on the Commission communication on
simplifying and improving the regulatory environment

(Parliament adopted the resolution)

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President. – That concludes the vote.

EXPLANATIONS OF VOTE


  Ribeiro e Castro (UEN), in writing. (PT) I voted in favour of this report, which proposes, without amendments, the approval of a Commission proposal intended to codify Council Decision 78/774/EEC, concerning the activities of certain third countries in the field of cargo shipping. This Council decision aims to establish a set of information systems that will enable the various European institutions to be kept informed about activities of the fleets of third countries whose practices could be harmful to the maritime interests of Member States, and, most importantly, about the extent to which these fleets may adversely affect the competitiveness of those of Member States taking part in international maritime trade. These systems must also facilitate the provision and consultation of information at intra-Community level.

  So as not to destroy the substance of the acts to be codified, the Commission’s proposal is limited to compiling them and putting them together in one document, subject only to the formal amendments required by the actual codification process. This process should also serve as clarification, given that Council Decision 78/774/EEC has been substantially amended several times.


  Ribeiro e Castro (UEN), in writing. (PT) This report approves the Commission’s proposal for a Regulation, which aims to prepare the countries of the Western Balkans for future accession, by familiarising them with the policies and working methods of the EU. More specifically, all natural and legal persons from the Member States covered by Regulation (EC) No 2666/2000 are permitted to take part in tenders organised under the pre-accession Community assistance programmes. This proposal thus gives added impetus to the stabilisation and association process. These measures address what was approved at the Thessaloniki European Council. I therefore voted in favour of this report.
Ribeiro (GUE/NGL), in writing. (PT) The introduction of the new financial regulation required basic instruments to be adopted for a number of grants that have been financed to date without needing their own legal basis.

The purpose of this proposal for a Council and Parliament decision is to establish a Community action programme for Commission grants in the field of protecting the Community’s financial interests – the HERCULE Programme. This programme will ultimately finance specific measures and will cover grants to bodies working in this field.

This report improves the proposal for a decision, and as such deserves our support. Firstly, the report is in line with the decisions of the budgetary authority agreed at the end of last year, in other words, an action programme for 2004-2006, which will be funded to the tune of some EUR 12 million. It proposes that the grants should subsequently be staggered in line with the aims (technical support, training, exchanges of specialised staff and seminars and conferences) and that reporting by OLAF, on the execution and aims of the current programme, is to be brought forward.

Ribeiro e Castro (UEN), in writing. (PT) This proposal for a decision aims to establish a Community action programme to promote activities in the field of the protection of the Community’s financial interests (HERCULE Programme), and I am naturally in favour of this.

This programme covers, on the one hand, grants allocated to occasional activities, such as study schemes, conferences or training and, on the other, operated grants allocated to bodies working in this field, such as associations created to promote the protection of the Community’s financial interests.

Indeed, the current process of reforming the Commission, and in particular the adoption of the new Financial Regulation applicable to the general budget of the European Communities, requires basic instruments to be adopted for a number of grants that have been financed to date without being covered by a specific basic instrument. Of the grants that will in future need to be covered by a basic instrument, there are several that have been made by the Commission to protect the Community's financial interests. The purpose of this proposal is to establish that basic instrument by setting up a Community action programme for Commission grants in this field.

The purpose of this proposal is to constitute a basic instrument of this kind, establishing a Community action programme for the allocation of grants by the Commission in this field. To be more specific, the measures required in the fields of prevention and combating fraud against the Community’s financial
interests, in accordance with the provisions of Article 280 ...

(Explanation of vote abbreviated in line with Rule 137(1) of the Rules of Procedure)


Ribeiro (GUE/NGL), in writing. (PT) In December, Parliament approved the budget for 2004 – both the Community budget for the EU of 15, and, in collaboration with the Council, indicative values for enlargement to ten new Member States. The focus was, therefore, on a Community budget for 25, even though enlargement does not actually take place until May.

The aim of this Draft Amending Budget is to establish fixed amounts for the EU of 25. The issue here is not merely technical, yet nor is it primarily procedural.

The key issue is the content of the first budget of an EU enlarged to include countries in which average incomes per head are substantially lower than the current EU average; a budget with payment spending raised to the level of inflation; the lowest budget, in real terms, since 1987; a budget that is not only incapable of contributing towards economic and social cohesion, but also institutionalises discrimination towards the new Member States; a budget that sets a bad example of Parliament’s role as a budgetary authority, as, year after year, it accepts cuts and redeployments, which, in spite of worthy protests, tally with the objectives of the ‘Charter of the six’.

This budget does not augur well for the 2007/2013 financial framework. It is characterised by political aims that are dominated by the obsession with competitiveness, and in which social issues are replaced by military and security issues. It would be difficult for a budget to be any more explicit.


Figueiredo (GUE/NGL), in writing. (PT) The forest fires last summer in Portugal left a trail of death and devastation – 11% of forests and 5% of Portuguese territory caught fire. This clearly illustrates the need to fund forest fire prevention measures that will preserve the EU’s rich and extensive forest heritage, particularly in southern Member States and the Mediterranean fringe, which are affected by such fires every year.

Appropriate measures are also required, however, at Community level. The new forest protection programme, Forest Focus, which was approved last year and which runs until 2006, includes measures for combating forest pollution. Measures required for preventing forest fires, however, are consigned to rural
development, thereby undermining the continuity of measures funded thus far.

It should not be forgotten that, in various resolutions, Parliament has asked for increased funds for the forest protection programme and for fire prevention measures to be included. We therefore regret that, when the reference amounts for the programme were being adapted, the opportunity was not taken to consider the needs of enlargement, in order to adjust aims and increase appropriations. In spite of the large increase in the forest area of the EU, only EUR 4 million for the ten new Member States has been added to the already paltry EUR 61 million for this period ... 

(Explanation of vote abbreviated in accordance with Rule 137(1) of the Rules of Procedure) 


Ribeiro (GUE/NGL), in writing . (PT) During the budgetary procedure for 2004, it was agreed that we would revise the reference amounts for the 29 Community programmes adopted under codecision, in order to take account of the needs of the ten new countries for 2004-2006, since these amounts had only been set for the fifteen current Member States.

At the conciliation meeting of 24 November, the Council and Parliament reached an agreement to increase reference amounts by EUR 2.58 million, only around EUR 30 million short of Parliament’s original proposals.

This cannot, however, be seen as a victory, since Parliament’s original proposals were in line with the limits set out by the financial perspectives. Many of these programmes adopted under codecision had become underfinanced for the fifteen, and we should have taken the opportunity to make some general corrections to the programmes and, in some cases, to the actual aims themselves. We refer to complementary programmes to the actions of Member States in fields such as the sixth research and development programme, the framework programme in favour of culture, Forest Focus for the protection of forests, Life III, public health, youth, education, including Socrates, and many others.

This report, one of five, validates an agreement that falls short of what is required, with Parliament’s direct complicity, and we condemn this.

Figueiredo (GUE/NGL), in writing. (PT) Around 15% of the population of the EU – over 57 million people – live close to the poverty line. In Portugal alone, more than two million people – over 20% of the population – live close to the poverty line. While nothing is done to alleviate severe income inequality and major unemployment, which affects over 14 million people, the risks of poverty and social exclusion will increase, and will increase still further with enlargement to include ten countries in which the average income is lower than the Community average.

It is, therefore, regrettable that the Community programme of measures to combat and prevent exclusion receives just EUR 75 million in funding for the 2002-2006 period, in other words, an average of EUR 15 million per year for the current 15 Member States. Worse still, the adjustment made to take account of the needs of enlargement is only EUR 10 million, or EUR 2 million per year. Parliament’s complicity in this state of affairs is regrettable, given that fighting social exclusion and poverty ought to be one of our key priorities, even bearing in mind the limited objectives of the current programme.


Ribeiro e Castro (UEN), in writing. (PT) I voted in favour of the package of Commission proposals before us (one proposal for each type of legislative act in question: sui generis decision, decision, regulation, and another on the proposal to adapt the reference amount of the sixth Euratom framework programme) aimed at amending the reference amounts of programmes adopted under codecision, to take account of enlargement.

By revising the financial perspectives for 2000-2006 to take account of enlargement, Parliament and the Council must – at the end of the budgetary process for 2004 and in line with the process of codecision – revise the reference amounts for programmes adopted under codecision, within the maximum limits of the aforementioned adaptation and revision of the financial perspectives.

I feel that the extra amount proposed – EUR 2.58 million, on top of the original budget of EUR 26.7 million – meets funding needs arising from the current enlargement process, for this vital package of programmes adopted under codecision and financed under Heading 3 of the financial perspectives (internal policies). Results were in some cases excellent and therefore worthy of the highest praise and, accordingly, of our unequivocal support.

Queiró (UEN ), in writing . (PT) At present, under the current legislation, when an official vessel of a Member State detects and pursues on the high seas or from the high seas, a vessel suspected of illicit drug trafficking, which is flying the flag of another Member State, it cannot take any action against it without obtaining the prior authorisation of the flag Member State. Given the need for prior authorisation and the time taken to obtain this, many anti-drug-trafficking operations end in failure on the high seas.

The basic aim of the Spanish initiative needs to be viewed against this background. That aim is nothing other than to step up cooperation between EU customs administrations in combating trafficking in drugs and psychotropic substances by making it possible, in particularly urgent circumstances, for an official vessel of a Member State to take action on the high seas against a vessel flying the flag of another Member State, where there is good reason to believe the vessel is being used for illegal drug trafficking, without having obtained prior authorisation from that Member State.

While this initiative is restricted to offences arising from illicit drug-trafficking on the high seas and in view of the amendments added by the rapporteur – albeit not all of them welcome, in our view – I voted in favour of this report.


Coelho (PPE-DE ), in writing . (PT) There has been a dramatic increase in illegal immigration and trafficking in human beings in recent decades. We therefore need to find fresh ways of combating this type of crime.

It is important to pay special attention to the situation of the victims of this type of crime. They must be afforded protection and help, especially if they are minors or from a similarly vulnerable group. These immigrants are exploited by gangmasters, and given their illegal status, it is very difficult for them to escape, since they are often afraid to contact the relevant authorities.

I endorse this Directive, as I feel that it will make a welcome contribution towards both helping the victims and catching the criminals. Short-term residence permits are to be granted to victims of an action to facilitate illegal immigration or trafficking in human beings who cooperate with the competent authorities.

Overall, the proposed amendments are aimed at improving the situation of the victims. The idea has been suggested of a reflection period, to enable them to consider whether or not to cooperate, which may be difficult in view of the difficulties they may have, not only in speaking about their situation, but ...
Schröder, Ilka (GUE/NGL ), in writing . I support the idea of helping victims of human trafficking. However, this is not at all what this directive is about. It simply forces victims to co-operate with police authorities by means of the threat of expulsion. Instead, comprehensive victim protection must ensure a permanent residence permit, thus granting full access to medical and social support without preconditions.

A clear distinction must be made between 'trafficking in human beings' and the smuggling of migrants. Trafficking simply means helping immigrants to illegally enter Fortress Europe – for profit or as a benevolent activity. Trafficking is based on a decision to migrate, but it often ends in exceptionally exploitative capitalist conditions of work later. 'Illegal immigration' is nothing more than the understandable reaction to EU-efforts to fence itself off from migratory flows resulting from global poverty, war and capitalist exploitation. 'Illegal immigration' is usually the only way to reach EU-territory at all.

If you really want to help victims of trafficking and exploitation, you should not hide behind the interests of European law enforcement authorities and fob victims off with short-term residence permits.

Instead, free access to the EU must be part of a free world so that people can move freely.


Queiró (UEN ), in writing . (PT) The Commission’s communication, on which this report is based, is intended to improve the monitoring of the application of Community law, in view of the need to pre-empt the natural increase in tasks arising from enlargement and to take account of the extension of the Community acquis. The Commission proposes various actions designed to improve the monitoring of the application of Community law. The communication details what is covered by the prevention carried out in close and reciprocal cooperation between the Commission and the Member States; it then describes the conditions of effective management of monitoring and of how infringements are dealt with, which will become even more significant after enlargement; finally, it looks into the possibility of gradually changing the culture of monitoring, by introducing the dimension of preventing such behaviour.

There are, of course, both positive and negative aspects to Mr MacCormick’s draft report. Among the good points were Recital L: ‘Failure by the Community legislature to achieve good quality in law-making can itself be detrimental to the
correct understanding and application of Community law’; and ‘its desire to see enhanced cooperation between parliamentarians in the European Parliament and Parliaments of Member States’.

These points were sufficient for me to vote in favour.

- Ribeiro e Castro (UEN ), in writing . (PT) As the report states, the most effective guarantee of the proper implementation of Community law begins with the quality of its law-making. It is only with high-quality legislation that the law can be understood and applied correctly. Appropriate monitoring effectively depends on information that is both qualitative – concerning the practices adopted in actually applying the law – and quantitative, reporting on numbers of directives whose transposition or effective application is delayed by reference to established deadlines, or otherwise deficient.

It is important to underline, as regards this measure, the importance of close and reciprocal cooperation between the Commission and the Member States. As the Commission’s communication rightly points out, simply punishing infringements will not be sufficient; it is also essential that we prevent such infringements before they happen. Such pre-emptive action must involve closer collaboration with national parliaments and meticulous compliance with the principles of subsidiarity, proportionality and appropriateness.


- Coelho (PPE-DE ), in writing . (PT) The question of biological and chemical agent attacks against EU Member States has been the subject of debate, particularly since the terrorist attacks of 11 September. A joint programme has been adopted, which is intended to improve cooperation between Member States in the areas of evaluating chemical risks, alerts, intervention, the storage of means of intervention and in the field of research.

We must, however, be realistic and rational with regard to the measures that we decide to take were we to be faced with the threat of this type of attack. I feel that the adoption of budgetary and legal initiatives must be based on a clear risk analysis demonstrating a genuine probability of terrorist attacks in the EU.

Consequently, I support the recommendation that a realistic analysis should be carried out of the threat posed, which will form the basis of an EU response. This will make use of European cooperation between national police forces involving Europol and take into consideration the results of cooperation between intelligence services in the fight against terrorism.
Ribeiro e Castro (UEN ), in writing . (PT) This question achieved almost complete consensus in committee, with only two Members voting against.

The report aims to improve preparedness and response to biological and chemical agent attacks. It concludes that an effective system against such attack would be based on four pillars: effective early warning system; effective reporting system; a well-developed public health care system; and emergency planning in the event of a disaster. What is in fact required is an effective response framework in the event of a disaster, way beyond being a mere stockpile of vaccines, which may seem at first glance to be a simple solution, but which offers no guarantee of success.

I therefore voted in favour. Since the events of 11 September, terrorism has become a genuine threat. Due to its unpredictable nature, combating terrorism must take the form of prevention. I congratulate Mr Schmid on his report, but I should also like to suggest a somewhat different approach; measures should be taken actually to thwart biological and chemical attacks. Citizens will be safe from terrorist attacks of any type, if such attacks could be neutralised in time.

Figueiredo (GUE/NGL ), in writing . (PT) The report before us poses such a vast array of questions that it would be impossible to cover everything in this short explanation of vote. Nonetheless, while I do not agree with the thrust of some premises and proposals contained therein, the report deserves praise for the criticisms it makes of the current repression of rights and of safeguards of privacy and the protection of personal data – as a consequence of measures adopted in certain countries under the pretext of the ‘fight against terrorism’ – which are undermining fundamental rights and freedoms.

I should like to highlight criticism in the report of the agreement being negotiated between the EU and the USA concerning the transfer of transatlantic passengers’ personal data, which it deems illegal. The report also criticises the attitude of the Commission and of some Member States ‘to connive at this violation of the law and the principle of legality’. As a result, personal data are, without informing and obtaining the consent of the data subject, transferred or accessed directly or systematically by a third party. I should also like to point out the need for effective monitoring of Europol and Eurojust, the concern with strengthening SIS and with projects to extend the capacities and competences to SIS II and the anxiety regarding the development of the use of personal biometric data.


Figueiredo (GUE/NGL ), in writing . (PT) While I do not agree with the wording of certain parts of this report, I feel that the report does contain a set of proposals intended to uphold the dignity of people held in the various EU countries, to improve the conditions in which they are held and to help them to reintegrate into society.

The report begins with an alarming picture of the situation in various parts of the EU in terms of aspects such as prison overcrowding, the increase in the prison population, the increase in the number of detainees awaiting definitive sentencing, drug addiction and rising suicide rates.

The report makes various general recommendations, which I welcome. Among these are the prisoner’s right to have access to a lawyer, the prisoner’s right to health and safety, to decent conditions of detention, to professional and social reintegration; the recommendation of protection for juveniles and special protection for pregnant women and mothers of young children; and the recommendation that prison staff should receive training and enjoy decent working conditions. If implemented, these recommendations will help to solve the serious problems that exist.

Roure (PSE ), in writing . – (FR) Prison conditions in Europe are alarming; the report before us today highlights the increase in the prison population, overcrowding, the increase in the numbers of foreign prisoners and the increase in the number of prisoners awaiting sentence.

A Council of Europe report also refers to the persistence of ill treatment and unsuitable and insufficient prison buildings, as well as mentioning the inadequate activities and care provided, and of the increase in drug addiction.

I support the drafting of a European Prisons Charter containing binding rules for Member States. We call on the Member States to release funds to modernise prisons and to provide more suitable training for the police and prison staff. We propose more widespread use of alternatives to prison sentences. We would also like to increase opportunities for Members of the European Parliament to visit prisons.

All the amendments I tabled in committee were adopted. They seek to strengthen several aspects of the report. All inmates must be able to take part in schemes designed to help them reintegrate back into society, so that fewer of them re-offend. It is essential to strengthen measures to prevent violence between fellow prisoners and prevent suicide. Special protection must be given to juveniles and women, particularly pregnant women and mothers of young children.
Ribeiro e Castro (UEN ), in writing . (PT) I am, naturally, in favour of the fundamental rights of prisoners and I am aware of problems such as overcrowding, the rates of death, suicide and ill-treatment and the inadequate nature of prison facilities, which force us to consider the need to take certain measures in this area.

This area, however, is strictly a competence of the Member States. Consequently, due to the subsidiarity principle, I voted against.


Bastos (PPE-DE ), in writing . (PT) The common position submitted by the Council tallies with the positions previously adopted by Parliament. It does, however, contain two points that we should like to see amended, so that the second phase of the Daphne Programme (2004-2008), which is already some months behind schedule, may get under way.

Firstly, the Council’s proposal places too much emphasis on the perpetrators of violence, which creates a further target group on the same level as the victims of violence. We endorse the need to set up treatment programmes that are also aimed at perpetrators of violence, and as such we ask that these should be referred to only in the paragraph on treatment programmes that are aimed both at victims and people at risk and at those who have perpetrated violence.

The second point is the establishment of a support centre for NGOs, so that they may be able to improve their projects, set up links with other partners and enjoy the benefits of the Daphne acquis. The provision of technical support is essential during this second phase of the programme, especially for those NGOs taking part for the first time, in other words, those from the new Member States.

Figueiredo (GUE/NGL ), in writing . (PT) Even though most of Parliament’s proposals on extending the Daphne Programme until 2008 had already been accepted, and even after funding had been increased to EUR 50 billion, we voted in favour of the rapporteur’s position. We must implore the Commission to maintain the balance of its proposal with regard to victims and attackers, and to ensure that these are not placed on the same level.

We also agree with the amendments tabled by the rapporteur to ensure that new Member States can also benefit from this programme, not least through the creation of a support centre aimed at helping NGOs to plan their projects and establish links, especially those taking part for the first time.

It is essential, however, that governments in Member States pay particular attention to this problem and do not leave the violence prevention campaign solely to the NGOs. Indeed, a recent programme on a French television channel
criticised the fact that no awareness-raising campaign against violence has been launched on that channel. There is such a campaign in Spain, yet more than sixty women have died in previous years, and this year is following a similar pattern. Portugal is in exactly the same situation as Spain.

Hudghton (Verts/ALE), in writing. This Parliament has long supported the development of the second phase of this programme designed to fight violence against women and children and to combat trafficking of human beings with a special focus on women and girls who might fall victim to abuse.

The fact that the Council has given its support to this programme and has taken on board some of this Parliament's strengthening amendments (including the increase in budget) is to be welcomed. I support the Women's Rights Committee's text and trust that the plenary will accept a well balanced report which should ensure that the new Member States can fully benefit and that their specific needs will be taken into consideration.

Stirbois (NI), in writing. – (FR) On the day after the day devoted to women’s rights, I am pleased to see that the European Parliament is also taking this issue to heart. No fewer than three reports on the subject are to be put to the vote today.

Unfortunately, however, the reports only contain general and commonplace statements. The report on combating violence against children, young people and women is no exception. To combat this type of violence effectively, it is necessary to focus on those who perpetrate violence, not just on the victims. Above all, it is essential to be able to understand the social, family, economic or even religious reasons why individuals lose control and resort to violence. In truth, all this report does is to state that there has been an exponential rise in these types of violence. It fails to deal with the real causes of such behaviour. In fact, all this violence tends to result from the same causes.

Violence against women cannot be eliminated without addressing the factors that contribute, directly or indirectly, to women being in a submissive position. I am thinking particularly of the status of women in Islam. In Islam, women are perceived as inferior and submissive. Under no circumstances are women’s rights a secondary consideration.

(Explanations of vote abbreviated in accordance with Rule 137(1) of the Rules of Procedure)

Raschhofer (NI). – (DE) Mr President, ladies and gentlemen, in today's vote on the copyright directive I voted for Amendments Nos 101 or 55 and 53. What is involved here, to all intents and purposes, is the introduction of stronger copyright laws through the back door, further strengthening the hand of large suppliers, while, as a consequence, many small suppliers will be unable to operate successfully in the marketplace. The reason being that they cannot afford long-drawn-out procedures and patent rights. What is at issue here, moreover, is the scope of the directive, which is intended to cover breaches of copyright. I believe that this applies when we are talking about commercial objectives with direct and indirect economic advantages. That is why I voted for Amendment No 53.

It is not true to say that this directive creates greater legal certainty, because there is no clear and uniform definition. If it is to achieve the Lisbon strategy, the EU needs patent legislation that protects financially weak, generally small companies and inventors, and thus encourages innovation. What the EU does not need is patent legislation that leads to a monopolisation of patent rights.

Berthu (NI), in writing. – (FR) The Regulation governing the statute and the financing of political parties at European level violates the fundamental principles I referred to during the course of yesterday’s debate. It also violates some of the procedural provisions of the Treaty.

By way of example, it violates Article 202 of the EC Treaty, which states that executive powers can be given to the Commission but not to the European Parliament. It also violates Article 198 of the EC Treaty, according to which, ‘save as otherwise provided in this Treaty, the European Parliament shall act by an absolute majority of the votes cast’. Article 5 of the Regulation states that the European Parliament shall verify compliance with the conditions of funding ‘by the majority of its members’, while Article 191 of the Treaty does not give it any authority in this regard. All this shows that this is illegal.

The Dimitrakopoulos report attempts to rectify this irregularity by reintroducing the requirement of the outcome of the vote to be a ‘majority of the votes cast’ vote at the level of the European Parliament regulation. This, however, does nothing but increase the confusion and the contradictions.

We hope that these anomalies will provide sufficient grounds for the Court of Justice to declare that this inopportune and badly-constructed regulation does not conform to the Treaty.

Butel (EDD), in writing. – (FR) The European political parties, or rather the manna from heaven that ought to fund them, amount to a rather sorry sight. This is how I understand Mrs Voynet’s declaration of her faith in Europe by the creation of a European Green Party. She also expressed her concern that Europe is not sufficiently loved by its citizens. I doubt that this self-interested love
demonstrated by the Greens, and by all the other political parties developing the necessary structures to be able to emerge, will actually strengthen the democracy of the European Union.

The report of the Committee on Constitutional Affairs has been cobbled together in a makeshift manner. It is a legal monster born of Regulation (EC) No 2004/2003, which, after numerous setbacks, was adopted on 4 November 2003. The regulation is currently the subject of an appeal before the Court of Justice, which I filed together with several of my fellow Members, thus showing that the delegation of the Group for a Europe of Democracies and Diversities is equally determined to oppose this new resolution. Further, we see the new politico-financial responsibilities devolved to the Bureau of the European Parliament as a cause for concern. The Bureau will be sitting in judgment upon itself. There is also likely to be extra work, in the very short-term, for the Court of Auditors and for OLAF.

Figueiredo (GUE/NGL), in writing. (PT) As we can see, Parliament is assigned a new task, which is different from the ‘traditional’ tasks, in which ‘Parliament exercises “external” powers’, in other words, monitoring ‘European political parties’. This would, for example, establish the procedure of ‘sanctioning’ a ‘European political party’ that no longer observed the ‘principles upon which the EU is founded’.

While the report tries to have us believe that it is of a technical nature, I feel that this report is, much to the contrary, highly significant politically. It puts in place the ‘Statute and financing of European political parties’, which sets out – and this is crucial – a certain model of the European political party, and establishes procedures for access to financing, for which discriminatory conditions must be fulfilled.

There are many aspects to cover, but it is essential to mention how strange it is that Parliament is in charge of this process, since it will be the judge and the judged, and this according to criteria and procedures that may lead to exclusions on entirely political grounds.

I should also like to point out that the original aim of this entire process was to bypass the Court of Auditors’ criticism of the financing by certain groups in Parliament of their respective ‘European parties’. This solution has been imposed by the dominant players in the EU, without any genuine support, hence our vote against.

Gollnisch (NI), in writing. – (FR) Parliament seems to be ignoring the three appeals concerning this procedure brought by different political groupings. They contested the legality of the Regulation governing the statute and the funding of
political parties at European level.

Parliament should remember that the existence of these parties is far from being established, and that this regulation violates many principles, among them the principle of equality, the principle of freedom of thought and of conscience, the principle of democracy, and the principles of the separation of powers, political pluralism and subsidiarity.

Firstly, this new system will allow the funding for such parties to be withheld not on objective criteria but on criteria based on teleology and political purpose. In requiring the parties to observe ‘the principles upon which the European Union is founded’, parties which do not subscribe to a particular European doctrine will be barred from receiving any funding. Furthermore, this control is initiated and operated by Parliament itself. It cannot be a judge and a party at the same time. This new system will also lead to many different kinds of discrimination. In effect, by imposing very high requirements for the formation of a European political party, the aim is to exclude new groups ipso facto. In this regulation, the usual legal approach has been swept aside for an entirely arbitrary one. Does Parliament want to make a stand for democracy? If so, I call on it to counter all threats to political pluralism.

(Explanation of vote abbreviated in accordance with Rule 137(1) of the Rules of Procedure)

Pasqua (UEN ), in writing. – (FR) The report before us contains the first measures on the application of the Regulation governing the statute and financing of political parties at European level, adopted in June 2003. The report determines which Parliamentary bodies are competent to allocate public funds to European parties.

Although in the past I supported the Regulation, I cannot now endorse the content of this report. The report entrusts the allocation and management of Community funds to the Bureau of the European Parliament, on the grounds that the Bureau is already responsible for funding issues concerning the internal organisation of Parliament. This is clearly not a convincing argument.

Article 3(c) of the Regulation treats the funding of parties as an entirely political question. The allocation of Community subsidies depends on political loyalty. The interpretation of this does not entail all the necessary guarantees of impartiality – far from it.

It is therefore totally unacceptable to make the Bureau responsible for deciding on requests for or the suspension of public funding. The Bureau is a bureaucratic body where only certain political tendencies are represented. As this is a political issue, the Conference of Presidents should be entrusted with the necessary powers, as it is an openly political body.
Patakis (GUE/NGL), in writing. (EL) We voted against the Dimitrakopoulos report because it completes the procedures for the promotion of the central idea of the Rules of Procedure for the European parties and their financing, in other words the creation of agencies and mechanisms which will ‘create a European conscience’ and cultivate the perception of the one-way, capitalist, anti-grass roots policy.

Any opposition voiced will be denied any room for expression. Measures are being taken to muzzle the opponents of the system. Rights are being abolished, such as the right of free expression and to establish political parties. On the basis of Community orders and the choices of big business, the European Parliament is being turned into the judge of the ‘political correctness’ of these parties.

The majorities will decide on the legality of the existence of the minorities or at least on the terms on which their ideas are projected and on whether or not resources should be granted for such projection.

The amendments proposed by Mr Dimitrakopoulos move in a more conservative direction. While excessive powers are granted to the more easily controlled Bureau of the European Parliament, the sole right reserved for the European Parliament itself is to decide ‘by a majority of the votes cast’ (not even an absolute majority of its members) if a party does or does not observe the principles of the EU; in other words, if it fits into the mould of big business in the EU and its system.

We shall vote against this report because it turns the European Parliament from a forum for the juxtaposition of ideas into the judge of the right of ideas to exist.

Queiró (UEN), in writing. (PT) We should like to call into question the contentious point that decisions on establishing political alliances or political parties at European level, which are not internal organs of Parliament, and on allocating grants to these organisations, are the exclusive competence of Parliament. This is especially controversial as it is based on vague and elastic criteria, allowing decision-making to take place purely on political grounds, in which the Members will be both judge and judged. It is precisely because the Bureau is the body with the competence to take such decisions that I voted against this report. Not every political group represented in Parliament sits on the Bureau, yet all political groups must take part in such politically charged decisions as creating political organisations that are eligible for Community funds. Otherwise, the transparency of these decisions is compromised. The Union for Europe of the Nations Group consequently tabled an amendment aimed at replacing the Bureau with the Conference of Presidents, the body that reconciles such representation. Given that this proposal was rejected, I voted against.
Ribeiro e Castro (UEN), in writing. (PT) The report before us is a response to the need to amend Parliament’s Rules of Procedure, in view of the new competences in the fields of financial management and of monitoring the legitimacy of political parties at European level. To my mind, this undermines the provisions of the Treaties.

The Bureau will be responsible for most of the tasks relating to the operation of the funding system, since it is the body responsible for financial and administrative matters concerning Members and the internal organisation of Parliament.

I must reiterate the need – in accordance with the principles of appropriateness and proportionality – for provisions, especially financial provisions, concerning political parties at European level, to be extended and actually applied to all political parties at European level, without discrimination and regardless of whether or not they are part of European political parties or European alliances of political parties.

As Mr Berthu stated in his minority opinion, I fear that the new system will bring about all manner of discrimination. I also regret the rejection of an amendment tabled by the Union for Europe of the Nations Group, conferring competence to the Conference of Presidents, rather than the Bureau, which would be a more solid guarantee of pluralism and participation.

I voted against.

Scallon (PPE-DE), in writing. I believe that the European parties' statute, which provides for the financing of European political parties, is in breach of the subsidiarity principle. It is for the citizens of a Member State to decide whether or not they will choose to fund national political parties or independent representatives.

The criteria for EU funding only of pan-European political parties exclude and therefore discriminate against smaller national parties and independents. It is also extremely worrying that the decision on whether or not a party will share in EU funding will be taken by an institution of the European Union.

This hardly supports the fundamental principles of democracy and subsidiarity.

Mr President, I said earlier that this was largely a tidying-up exercise, but drew attention to the fact that Rule 180(8) would now apply to all Rules of Procedure. This means that in the new Rules to be published in time for the new Parliament – indeed, presumably in time for the enlarged Parliament in May – the figures in our Rules will automatically be adjusted to suit the expanded size of Parliament. Those figures have to be adjusted to be the same proportion for the enlarged Parliament as they are for this Parliament. For instance, the figure of 32 Members needed to table a motion or an amendment will rise proportionately.

Through what we have voted, this will also apply to Rule 29 in its new version, which lays down the minimum size for constituting a political group in Parliament. The figure in the new version is '16 Members from at least 5 countries'. That will have to be revised upwards to 19 Members – or whatever the number is – from at least 5 countries.

However, as we realised that this would affect existing groups in the House just for the May part-session, there is a provision that allows existing groups to continue as they are until the elections, irrespective of this rule change. This means that none of the existing groups need to fear being dissolved before the election campaign. They will subsequently have to look at their situation in the newly elected Parliament after the elections, as will every group, on the basis of the verdict of the electorate.

Mr President, I believe Mrs Frassoni made a comment about voting on Amendment No 4. A number of votes were taken en bloc. If I am correct, I think the point she made was that temporary committees would no longer have the same status as they have had in the past: Parliament would not be able to set up temporary committees. Mr Corbett, am I right on this point?

President. I do not want to encourage a debate here, but Mr Corbett, please make a brief response.

Mr President, I can allay the fears of colleagues: Mrs Frassoni was mixing up committees of inquiry and temporary committees. I will take the matter up bilaterally with her.
Mr President, ladies and gentlemen, I voted against the Paulsen report not so much because of its content – with which I was not totally familiar – than as a reaction to the procedure. After the vote in committee, we were faced with a result that made implementation of the regulation impossible. That was a reflection of the widely varying opinions of the members of the Committee on the Environment, Public Health and Consumer Policy. At the rapporteur’s request, the Council has now, and somewhat unusually, brought forward a new text in advance of the vote in the House. The rapporteur agreed this text with four of the groups in Parliament and presented it to this House in what I see as a very undignified manner, with new versions of the English text being presented day after day over the last week. It was not until this morning that all the changes, that is to say changes in the form of the Council text, were presented to Parliament.

We are now looking at a totally new legislative text that has not been discussed in committee beforehand. This House has had no opportunity whatsoever to adopt a position on this text in committee; instead, the text was immediately presented to the House with adoption today by a non-qualified majority vote. If we made this system the rule, then we would certainly have a very rapid procedure, and we could deal with all legislative texts within four weeks. The Council would just have to present a text, four Members of this House would nod it through, and the whole House would vote for it, because it would not be possible to address its actual content.

I regard this way of proceeding as extremely dangerous, because the hallmark of a parliament is the way it debates a topic and its diversity of opinion. It cannot amount to a dictatorship by a handful of people in the groups, who explain overnight at a group meeting what is in the text, without anyone knowing exactly what is actually being voted on.

I urge you to think about this and only to permit this procedure in exceptional cases in future. I can of course understand that Mrs Paulsen is anxious to put her report to bed, because she is not coming back. However, she could also have achieved that by talking to me. But that is not what happened. I hope you will take this point on board and reject any such procedure in future.

President. Today's vote, which was a first reading, required only a simple majority. Whether or not we had a qualified majority was not at issue today. That will be an issue at another stage of the procedure. As you know – and I heard your point – the House is sovereign. I followed the correct procedure, I put the question to the House, I followed the advice of the rapporteur, I invited the committee chair to speak, a majority expressed itself in favour of proceeding and I then did so, as is my duty.
Figueiredo (GUE/NGL), in writing. (PT) We have recently seen a series of food and livestock crises, such as ‘mad cow disease’ and foot and mouth, which illustrate the need to raise food safety standards. Appropriate legislation must be adopted that encompasses all stages of food production and processing, that ensures that consumers are provided with the information that they need and that sets up official control systems, thereby ensuring compliance with the law and penalties for those who infringe it.

Food and animal feed must be safe for human and animal health. Safety must be the overriding consideration, ahead of any commercial aim, be this for pure profit or for trade facilitation. A heady climate of permissiveness has been created in the wake of the abolition of internal borders and the gradual liberalisation of trade, which has, in turn, led to a lack of investment in essential technical resources (such as reference laboratories and research centres) and human resources (such as professional training). This situation must be stopped.

This regulation forms part of the same approach as other regulations in the White Paper on food safety, which establishes a series of common aims in the field of food safety and common EU-level sanctions. In other words, it addresses the consequences without calling into question either the underlying production model or liberalisation.

The proposals contained in the report fall short of what is required, despite a number of welcome proposals, such as the application of the same ...

(Explanation of vote abbreviated in accordance with Rule 137(1) of the Rules of Procedure)

Ribeiro e Castro (UEN), in writing. (PT) Since the mid-1990s, the EU has adopted an increasing number of legislative acts on questions of health and safety concerning food and animal feed, with the aim of responding to consumers’ pressing concerns. Monitoring and inspection have played a crucial role in this response.

The battle is far from being won. As the rapporteur stresses, what is required is greater stringency and a common legislative system applicable to all official monitoring. The objective is increased safety, both for consumers and for producers, and this report is a further step forward in the field of food safety, specifically in food and animal feed.

I am aware that this is a subject that has long been a priority area for the EU and, as such, I endorse the amendments tabled by the rapporteur. These measures will bring significant benefits to consumers.

Thors (ELDR). (SV) Mr President, on my own and Mrs Boogerd-Quaak’s behalf, I would state that we voted against the Fourtou report in the final vote. Certainly, it is important that measures be taken to combat piracy, but the regulations as amended go much further. In particular, extending the regulations to include patents would be a mistake.

We can also concur with Mr Schnellhardt’s criticism of the procedure, a criticism that can also apply where this point is concerned. For example, the group had extremely few opportunities to discuss this matter before we faced having to make a final decision. There is also justification for observing that more than 50 leading experts on intellectual property law in Europe appealed to Parliament to look more carefully at the matter, something we have not, however, done.

The legal basis can also be questioned, since the procedure is now at issue. Pursuant to Article 95 of the Treaty establishing the European Community, the Community has not usually approved such procedures. I wish therefore to observe that we have obtained regulations that may damage small enterprises and that are not limited to combating piracy, which is what is important.

Raschhofer (NI). – (DE) Mr President, ladies and gentlemen, I did not vote for the amendments to the European Parliament’s Rules of Procedure on the financing of political parties; not because I am not in agreement with all this, but because it is the logical consequence of the fact that back in June last year my colleagues and I voted against the Leinen report. Implementing the regulation in this way amounts to discrimination against the smaller party groupings in this House, which although they are active at European level nevertheless are not represented in any group. Financial support is given to large party groupings but not to smaller ones, thus creating a huge gap in terms of democratic deficit between these two kinds of grouping. We all know that parties and their organisations are dependent on financial contributions. This creates an uneven playing field between the parties at European level, and I cannot vote for that.

Turmes (Verts/ALE). – (FR) Mr President, I voted against the Fourtou report on intellectual property. In my opinion, the European Parliament has made a serious error of ethical judgment when voting on this report today.

The votes of the conservative, socialist and liberal Members produced a majority for a position on the issue of intellectual property that, in my view, gives too much weight to the interests of large multinational as against the interests of citizens. Intellectual property tends not to be an easy issue to deal with. The credibility of the European Parliament is at stake here.
How are we going to explain to the citizens of Europe that Parliament’s rapporteur, the person with the highest profile in relation to this dossier, is married to Mr Fourtou, who is none other than the chairman of Vivendi Universal? How can Parliament explain its policy to the thousands of European citizens, especially young people who learn about European policy on this issue by email, while the question of the existence of a personal interest overshadows a text such as this? I think Parliament has made a very serious mistake today.

President. – Thank you, Mr Turmes.

As you know, Mr MacCormick has already raised this question in a different way. For our part, I will put the question of interests, including family interest, to our Bureau. I will then be guided by its wisdom. This issue has certainly been the subject of much discussion within the House. I am not referring to this particular rapporteur nor to today’s report, but to the principle. This is a problem that we must address.

Lund and Thorning-Schmidt (PSE), in writing. (DA) We have voted in favour of Mrs Fourtou’s report (A5-0468/2003) on measures and procedures to ensure the enforcement of intellectual property rights and the negotiated compromise package.

It has been important to us to ensure protection for citizens and their rights and, at the same time, to combat growing trademark counterfeiting, pirate copying and the infringement of intellectual property rights. Moreover, the directive ensures further harmonisation of national legal regulations on the enforcement of intellectual property rights and helps ensure that the legislation is complied with.

The compromise means that the proposal is limited to circumstances of a major commercial character. It excludes offences by consumers who have acted in good faith and strengthens people’s right to carry out private copying in accordance with the Copyright Directive. It means that judges must take account of the intention behind infringements, and it ensures the confidentiality of important information. Moreover, adoption is in accordance with the EU’s global obligations in relation to the World Intellectual Property Organization. It also means that there is proportionality in the proposal and that obstacles to trade must not be created.

Finally, we consider it important to have the proposal adopted before enlargement. Adoption following enlargement could mean that future legislation would only be adopted in several years’ time, which could lead to increased illegal activity.
Malmström, Paulsen and Olle Schmidt (ELDR), in writing. (SV) We have chosen to vote against the compromise on the harmonisation of the Member States’ legislation on intellectual property rights, mainly because of the amendments to Article 9 that have been tabled. If the proposals for amending Article 9 are adopted, this will lead to conflict with Swedish legal tradition, especially the principle of the free sifting of evidence. We believe that, if such large alterations are to be made to legislation and thus to Swedish legal tradition, the changes should be well thought through and well worked out, and not arrived at in a hurry as these have been. We are not therefore opposed to altering the legislation, but we do not believe that the changes are satisfactory in their current form.

Ribeiro (GUE/NGL), in writing. (PT) The issue addressed in this report is difficult due to its history and its far-reaching ramifications.

As far as we are concerned, we are vehemently opposed to pirating and counterfeiting, and we advocate rules to promote the use of discoveries and inventions that belong to all humankind in these free and fair times. The first consideration is, therefore, the object of the protection of intellectual property. Should authors’ rights, trademarks and patents be treated in the same way? While we steadfastly oppose the misappropriation and commercialisation of human knowledge and of what is part of human heritage, we acknowledge the difficulty of striking a balance between legitimate property rights and the social and collective benefits of the item concerned. This, however, is the theory.

Whereas mechanisms to protect these rights are unable to stop trade and abuse, they must not be so lax as to allow, or even encourage, pirating and counterfeiting. An example of this is Port wine, and other such designations of origin to be preserved or created, given that it represents heritage that is universal and, therefore, local and national. As such, in the name of spurious liberalisation, it can have a devastating economic, social and cultural impact, as well as a detrimental effect on health.

The rapporteur has shown caution and, on this issue, it is better to be safe than sorry. Nonetheless, the rejection of certain amendments, especially those relating to the ‘federalist’ tendency, in which caution was nowhere to be seen, led us to vote against.

Zrihen (PSE), in writing. – (FR) Economic operators commit serious violations of intellectual property rights on a commercial scale. They deceive consumers or they usurp the identity, reputation or technical procedures other businesses have invested a lot in establishing. It is therefore right to establish special legal measures to combat this scourge.

Under pressure from certain lobbies, however, certain people wanted to ensure that this directive is applied with particular flexibility. This is extremely
dangerous as it opens the door to the abuse of these anti-counterfeiting measures. They could be used against private individuals, guilty of saving music from the Internet onto a CD, for example. Big business could also use these measures to harass weaker competitors such as small- and medium-sized enterprises, for example. Lastly, there is the fear that this directive could be used to return in a roundabout fashion to subjects on which Parliament has already reached a decision, like generic medicines and the impossibility of patenting software. This is why I voted against this draft directive, which Parliament has not succeeded in amending satisfactorily.


Ribeiro e Castro (UEN), in writing. (PT) I voted in favour of this resolution, as I naturally endorse the promotion of new technical requirements and new processes that actively contribute towards adopting measures taken against the emission of gaseous and particulate pollutants. The purpose of this proposal is to strengthen Community requirements regarding the restriction of new heavy vehicles’ polluting emissions (positive-ignition engines fuelled with natural gas or liquefied petroleum gas). This therefore constitutes a further important means of promoting the sustainable development that the EU champions.

Given the mishaps and delays that have affected this process and the ‘speed’ with which we are trying to push through amendments to the Commission’s proposals, there is no chance of establishing a framework in which operators and professionals in the sector are forced to comply with rules and to be subject to the relevant inspections. The rules have not been clarified and feasibility checks, especially of certain monitoring methods, have not been carried out. We must launch an awareness-raising campaign, as soon as possible, in collaboration with these professionals.


Andersson, Färm, Hedkvist Petersen, Karlsson, Sandberg-Fries and Theorin (PSE), in writing. (SV) We voted against Amendment No 1, designed to limit the applicability of the Framework Decision so that, where the drugs trade is concerned, it applies only to serious and/or international crime. We support the Council decision as a whole and believe that this addition would limit the scope of the Framework Decision and, therefore, clearly entail a deterioration in the Council’s document.

We also wish to emphasise that the EU should deploy every possible means to combat the use and sale of drugs. We interpret the Council decision as saying that drug trafficking is prohibited, and we therefore believe that ‘coffee shops’ should not exist within the EU.
Bernié (EDD), in writing. – (FR) There are three reasons for our rejecting the creation of an independent agency with its own legal personality to manage external borders.

Firstly, management of the land, maritime and air borders is the sovereign prerogative of Member States. It is for Member States to guard against the flow of migrants and to combat people trafficking. The Council of Ministers is, furthermore, unanimous on this issue.

Secondly, each Member State should have a representative on the Management Board. Decisions must be unanimous rather than being taken by a majority. To our great surprise, France is the only country proposing a 12-member Management Board, so removing the rights of Member States to manage their own borders.

Lastly, in our opinion, it is out of the question for the Agency to have exclusive powers on issues such as the removal of third country nationals illegally residing in a Member State and the establishment of a European Corps of Border Guards.

The United Kingdom and Ireland made the right decision in refusing to accept the Schengen acquis on the control of external borders. The French Government should have had the courage to do the same.

Figueiredo (GUE/NGL), in writing. (PT) We know that drug-trafficking is a threat to the health, safety and quality of life of citizens. In 2001, the Commission adopted an EU-level approach to combating trafficking, in view of its transnational nature.

The final agreement laid down substantial amendments to the Commission’s original proposal, such as the establishment of new sanctions that tally more closely with those set out in the UN Conventions on this issue, in contrast to the limited definition that the Commission had put forward. We welcome the fact that consumption is not penalised, although this question is not addressed as thoroughly as we would have liked. We are opposed to the European Arrest Warrant, hence our final vote.

Malmström, Paulsen and Olle Schmidt (ELDR), in writing. (SV) At present, drugs policy is not harmonised within the EU. Instead, each country devises its own policy. That does not, however, prevent the drugs issue from appearing high on the political agenda. Ever younger people are misusing drugs, and more and more young people see no danger in trying cannabis. Even what are termed party drugs, that is to say the most dangerous synthetic drugs of all, are becoming more widespread. In a Europe without borders, we are in danger of
having ever greater drugs problems as the legalisation of drugs extends beyond
the Netherlands. Many appear already to have given up the fight for a drugs-free
Europe.

It deserves to be repeated that there is a link between the number of people who
try drugs and the number of people who are in danger of getting hooked on their
misuse. The possession and use of drugs must therefore remain criminal
offences. The wrong signals are still being sent out to the young people of
Europe when anyone can buy five grams of cannabis at a so-called coffee shop.
We must not be satisfied with this Framework Decision, but must continue to
strive for a drugs-free Europe.

We say no. We do not wish to legalise, we do not wish to liberalise and we have
not given up the dream of zero tolerance for drugs.

Queiró (UEN ), in writing. (PT) Under the Italian Presidency, we were finally
able to conclude an agreement on the minimum provisions applicable in the
field of combating drugs at Community level. The main objections, both in the
European Parliament and in the Council, came from the Netherlands, where the
consumption and sale of small quantities of soft drugs are permitted. It is,
therefore, understandable that the Oostlander report should have confined itself
to proposing that the Council framework decision should be accepted in the
version presented, without any amendments, because this text received
unanimous approval after a year of negotiations. This did not stop me from
voting in favour of the measures that have been proposed. I wish to highlight
two of these: the penalisation of all types of trafficking, production and sale of
opium, cocaine and cannabis, and the condemnation of the production of
synthetic drug precursors if they are produced with the aim of processing drugs.

Applying the principle of subsidiarity allows Member States to use the
framework decision to sanction personal consumption, but does not force them
to do so, thereby respecting the various national legal and criminal systems of
the Member States.

Ribeiro e Castro (UEN ), in writing. (PT) After years of discussion in
Council, an agreement was concluded last November on the minimum
provisions applicable in the Community-level fight against drugs, and this
agreement has been submitted once again for the consideration of the European
Parliament.

All types of trafficking, cultivation and sales of opium, cocaine and cannabis
will be penalised and the production of synthetic drug precursors is to be
condemned if they are produced with the aim of processing drugs.

Activities relating to drugs used exclusively for personal consumption as
defined by national law are, on the other hand, excluded from the scope of this
framework decision. This means that, on the basis of the principle of subsidiarity, although Member States can use the framework decision to sanction personal consumption, they are under no obligation to do so.

Illegal drug-related activities will be punished by criminal penalties of at least one to three years’ imprisonment and incentives, aid or attempts to commit one of these infringements will also be punished. I regret, however, (and everything suggests that this is the result of pressure by the Netherlands), that judicial cooperation and extradition are not pursued more vigorously. I voted in favour.


> Andersson, Färn, Hedkvist Petersen, Karlsson, Sandberg-Fries and Theorin (PSE), in writing. (SV) We are well disposed towards an agency for better coordination and cooperation in the area of border controls. We wish nonetheless to emphasise the importance of national self-determination in the implementation of border controls. There must be no restrictions upon the competence of the Member States, and their influence upon the development of border cooperation must be retained in full.

> Berthu (NI), in writing. – (FR) We are very much in favour of greater cooperation between States for the better control of external borders and of the creation of a technical agency to encourage such cooperation. The von Boetticher report on the subject calls for a qualified judgment, however.

On the one hand, it tries to limit the agency’s tasks to technical cooperation and says that ‘the management of national borders should remain a sovereign Member State responsibility’, which is excellent. On the other hand, however, it sets the new system not in an intergovernmental framework but in a Community one, guided by the Commission and under the political control of the European Parliament, thus opening the way to extensions of supranational competences in the future.

It must in fact be read in parallel with the draft European Constitution, which shows the mentality that prevails in Brussels: Article 3(166) charges the Union with ‘the gradual introduction of an integrated management system for external borders’, that is a supranational system with a European border police. Although the von Boetticher report limits the agency’s tasks for the time being, it cannot therefore give us any reassurance. It appears to be looking to extend Community powers, which is inappropriate here.
Figueiredo (GUE/NGL), in writing. (PT) This report should be seen in the context of ‘gradually developing a genuinely integrated system of external border control management’, as proposed, in fact, in the draft ‘European Constitution’.

Whilst containing some contradictions, as a result of its supranational perspective – the report endorses the Commission’s role in this agency – at the same time, it rightly states that monitoring national borders should remain a sovereign Member State responsibility. One of the report’s more positive aspects is to criticise the idea of giving this agency the task of expelling immigrants.

What is being proposed is basically to create an agency that will have responsibilities to date held by the Member States, which will prop up what is known as ‘Fortress Europe’ and which will assist in stamping out immigration and in expelling immigrants. I accept that there must be cooperation between national bodies, in order to combat networks that exploit immigrants and traffic in human beings and to combat organised crime and money-laundering. Mechanisms for this purpose already exist, however, and so there is no need to create new instruments that remove tasks which fall strictly within the competence of the national authorities and which are sovereign Member State responsibilities. The crux of the issue is not, therefore, to create new agencies but to change current policies. Hence our vote against the report.

Queiró (UEN), in writing. (PT) Due to the increase in the external land, sea and air borders that will need to be monitored after enlargement takes place in May 2004, the European Union needs an effective system for managing its external borders, in particular to combat international terrorism and organised crime, illegal immigration, trafficking in arms, drugs and human beings and to combat crime at sea. For this reason, I support the establishment of a European Agency for the Management of Operational Co-operation at the External Borders. It was, incidentally, in this context, that I suggested – and plenary adopted this suggestion last November – a proposal to the effect that, when the next financial perspective is negotiated, Community programmes should be put in place to support defence re-fitting, in particular, a programme exclusively dedicated to developing equipment to protect the EU’s external borders. Nevertheless, given the intergovernmental nature of border control and in light of the experience that each of the Member States has acquired in performing this task, I believe that each Member State should be represented on the Agency’s Management Board to ensure that it can benefit from the skills and knowledge acquired ‘on the ground’ by each country at its own borders. Since the report did not see fit to take up this concern, however, I felt obliged to vote against it.
Establishing the European Agency for the Management of Operational Co-operation at the External Borders, which is expected to take up its responsibilities on 1 January 2005, arose out of the overwhelming need to improve the management of controls at the external borders which, it should be noted, now total 6,000 km in length. Account must also be taken of the European Union’s enlargement.

I disagree with the rapporteur’s view that the Agency should have a ‘more Communitarian’ character, but I did agree with the position expressed by the draftsman of the opinion of the Committee on Foreign Affairs, Human Rights, Common Security and Defence Policy, to the effect that the intergovernmental nature of border control should be maintained. This is in fact the line adopted in the Commission communication – without prejudice to a system of majority voting in the Agency (for operational reasons). On the one hand, this is a result of the Community legal system itself – and of the current division of powers – but, on the other, today offers better safeguards for the experience acquired by each Member State in performing these tasks (whether at air, sea or land borders or at all three). It therefore appears to make sense that the Management Board should be composed of one Member from each Member State, assisted by two representatives of the Commission. Consequently, I voted against the report.


Andersson, Färm, Hedkvist Petersen, Karlsson, Sandberg-Fries and Theorin (PSE), in writing. (SV) It must be possible for both women and men to combine family life and working life. We therefore welcome a Framework Directive in this area which establishes objectives in terms of, for example, working time, access to child care and minimum periods of parental leave. We do not, however, think that issues concerning the ways in which welfare is to be organised should be decided at EU level. We have therefore voted against wordings that require special forms of tax relief or the use of what are termed vouchers or that in other ways regulate welfare policy in detail.

We also wish to emphasise that families can take different forms in terms of how their members live together, and we therefore support the wording that states this. Families that do not consist of mother, father and child must also be recognised and be given the same legal status as the traditional family.

Arvidsson, Cederschiöld, Grönfeldt Bergman, Stenmarck and Wachtmeister (PPE-DK), in writing. (SV) We believe that family policy must be characterised by freedom of choice. It must be possible for both parents to combine working life with responsibility for their family. The Moderate family policy envisages highly flexible child care. We are, in principle, able to support quite a few of the proposals presented in the report.
We note that, in its explanatory statement, the report emphasises that family policy does not come within the competence of the EU. We agree with that and have therefore chosen to vote against the report as a whole.

Figueiredo (GUE/NGL), in writing. (PT) As we all know, at the Barcelona European Council, the Member States gave a commitment to eliminate obstacles to the participation of women in the labour market and to set up, by 2010, childcare facilities for at least 90% of children between three years old and the mandatory school age and for at least 33% of children under three years old. The need was stressed for a financial contribution for the creation and/or operation of high-quality childcare services at affordable prices. How, then, can this be reconciled with social spending cuts or with a large part of the childcare network being dismantled in the enlargement countries? Giving families more subsidies, vouchers or tax benefits is pointless unless the necessary infrastructures are in place. Unfortunately, the proposal we tabled to extend childcare to cover, by 2010, all children until they enter compulsory education was also rejected.

We must also highlight the need for structures to support the elderly and dependent persons, to improve the timetables of urban services, (opening hours for shops, businesses, transport, etc.) and integrated and humane housing and town planning. The report also calls for shorter working hours, a change of mindset, for a more equitable division of family responsibilities, and ...

(Explanation of vote abbreviated in accordance with Rule 137(1) of the Rules of Procedure)

Queiró (UEN), in writing. (PT) Since the 1990s, the Council has launched several actions to reconcile work and family life, making this a highly topical issue, and 2004 has consequently been declared International Year of the Family.

Mrs Bastos’s report argues that everyone should be able to choose whether to work or to stay at home and, if they decide to work, they must be able to reconcile working life with the needs of the family, whether in terms of children or the elderly, who are increasingly part of the family setup.

I could not agree more with this principle and I therefore welcome not only Mrs Bastos’s request that the European Commission evaluate the state of policies for reconciling family life, working life and private life, both in the current Member States and in the candidate countries, but also the emphasis she gives to measures to be implemented to support the family. These include financial assistance for childcare and education, vouchers for the recruitment of home helps for families with disabled children and vouchers to help low-income families with three children or more.
Ribeiro e Castro (UEN), in writing. (PT) In line with the proposal I tabled in the relevant committee, I welcome, in particular, the inclusion of the framework concept of ‘family-friendly policies’, and the guideline to pursue policies governing taxation and other levies and tariffs in public services that take account of the family and the greater size of family units, without discriminating against them. Also important is the report’s recognition of the social and economic value of family and domestic work, which is often overlooked and scorned, either through deeply-held prejudice or a simple lack of interest, which results in prejudice against individuals and in real inequalities.

I also welcome the adoption of the amendment I tabled against revising the concept of the family. Revising this concept would be both misguided and also outside the sphere of Parliament’s competence. The family, which is a secular sociological and anthropological reality and is unequivocally deep-rooted, must not be confused with individual options that result in different situations and which do not fall within the scope of the family. I would also highlight the aptness of the reference to the need to provide specific allowances for situations including large families, for children with disabilities or for multiple births, and also the idea that the Member States must develop forms of cooperation and networks for exchanging good practice. Once again, I congratulate Mrs Bastos on her excellent work and on the enormous step forward that this report represents. It will serve as a benchmark for family policies in the European Parliament.

Sacrédeus (PPE-DE), in writing. (SV) I have actively supported the fact that, in paragraph 3, the European Parliament comes out in favour of the Christian Democratic idea ‘that family policy should create preconditions to enable parents to spend more time with their children’. The same paragraph also emphasises the value of the fact that this would also ‘have a positive impact on family formation and family stability’. On the basis of this, what paragraph 2 calls ‘tackling the demographic problem faced by the majority of the Member States’ is an urgent matter.

In accordance with our view of society, Recital K of the report specifies that ‘the rights of children must be at the heart of family policies’.

The Group of the European People’s Party (Christian Democrats) and European Democrats succeeded in voting down Recital G (by 321 votes with 169 in favour and 21 abstentions) and, thus, the attempt to create a new and diffuse definition of what constitutes a family, something that is definitely not a task for the EU.

The PPE-DE Group believes that the concept of the family is based upon children’s right to their mothers and fathers and upon parents’ responsibility for their children. Children must always be at the heart of how we construct our
society, at the same time as the family is society’s most important and most fundamental building block. I therefore voted in favour of the report as a whole (there having been 424 votes in favour, 51 votes against and 37 abstentions).

Stirbois (NI), in writing. – (FR) The harsh fact is that women make up only 46% of the working population. There are 12 million working women and on average they earn 20% less than men. They are in fact victims of inequality, first of all in access to work: their unemployment rate is two points higher than for men and 80% of French adults earning less than the index-linked guaranteed minimum wage (SMIC) are women.

There are a variety of solutions. Obviously, women must be given the means to make a genuine choice between working or not, that is they must be given the means to stay at home and look after their children if they so wish, by increasing family allowances, for example.

Reconciling work and family life must at last be made possible, however. Today, single-parent families account on average for 14% of all families with children and 90% of single parents are women. These trends must be taken into account and working hours, childcare systems and childcare allowances, family benefits and parental (maternity or paternity) leave arranged accordingly. Equality between men and women certainly requires that. But we must be very careful to avoid quota systems such as we already have in the political field.

(Explanation of vote abbreviated in accordance with Rule 137(1) of the Rules of Procedure)


Figueiredo (GUE/NGL), in writing. (PT) This is a positive report, in which the rapporteur divides women from minority groups into: women with disabilities, migrant women and Roma women. For women who are disabled, it argues for the Directive establishing a general framework for equal treatment in employment and occupation to be transposed and for access to be provided to education, training, employment and occupational training in an ordinary environment. The report also calls for these women to be helped to become more independent and for their participation in political life and in decision-making to be promoted.

As regards migrant women, the report draws attention to incorporating the equality dimension into policies, programmes and actions designed to combat racism, discrimination and social exclusion. It calls on the Member States to ensure the effective application of the United Nations Convention on the Elimination of All Forms of Discrimination against Women and specifically states that migrant women should be able to participate in political life and in
the decision-making process.

Where Roma women are concerned, the report draws the attention of the Commission and of the governments involved to the need to ensure the effective application of policies implemented at Community and national level that are likely to improve Roma women’s economic, social and political situation.

This last aspect is the most important one, due to enlargement. The remainder of the report basically consists of rehashing earlier proposals and decisions. There is still a need for ...

(Explanation of vote abbreviated in accordance with Rule 137(1) of the Rules of Procedure)

Ribeiro e Castro (UEN), in writing. (PT) The rapporteur has produced a report on minority women’s groups, specifically women with disabilities, migrant women and Roma women. These are interesting perspectives, which warrant everyone’s attention. These are problems of which I am aware and to which I would truly like solutions to be found. To this end, I must express my particular concern at all types of violence (not only domestic violence) faced by women with disabilities and at the lack of respect for the individual rights of migrant women.

Since I broadly agree with the content of Mrs Martinez-Orozco’s report, I voted in favour of it. Nevertheless, I must point out that the problems I have referred to are not confined to women alone. These are situations that occur across the board and affect men too.


Arvidsson, Cederschiöld, Grönfeldt Bergman, Stenmarck and Wachtmeister (PPE-DE), in writing. (SV) Prior to the Swedish referendum on EU entry in 1994, all the parties working for EU membership stated that cohabitation issues, marriage legislation and abortion issues did not come within the competence of the EU. They promised to direct their efforts to ensuring that these issues remained areas in which strictly national legislation applied, without the involvement of the EU. We stand firm by that pledge to the Swedish electorate. We believe that national legislation is very much better in this area than common EU legislation.

We observe how other Swedish parties have abandoned that pledge and are ready to transfer these issues to EU level. Were that to happen, it would be to the detriment of Swedes and be in danger of conflicting with Swedish custom and tradition. There is no obvious need for coordination, and the best adjusted legislation will be achieved if the various national parliaments within the EU are
allowed to design the legislation in this area.

EU aid policy too must respect individual countries’ legislation. We share the Swedish view of the right to abortion but, out of respect for third countries, we have voted against those parts of the Junker report that demand free abortion. The report also focuses helpfully upon the serious health problems present in the developing countries, where EU aid policy has an important role.

Caullery (UEN), in writing. – (FR) The official themes of Mrs Junker’s report should have been the major chapters of the United Nations action programme drawn up at the Cairo conference ten years ago. We are therefore entirely justified in expecting to find in the report some relevant considerations of economic growth, migration, urbanisation policy or even the environment, all of which were issues raised and highlighted by the Cairo conference.

It is therefore very surprising to read a text where all these questions are completely passed over in favour of the recurrent obsession with questions of sexual and reproductive health, which occupy no less than 20 of the report’s 27 paragraphs. Even a question as central as education is mentioned only for the part it may play in the matter.

In short, the rapporteur sees the population question in the developing countries as coming down to a woman’s control of her body: it seems to us that a wider reading of the problem and one closer to reality in all its aspects would have been more useful, and also more respectful of the different approaches taken, within the Union, to a sensitive subject like abortion.

Hudghton (Verts/ALE), in writing. Karin Junker's own-initiative report seeks to tackle one of the world's most difficult challenges, of achieving more of the stated outcomes of the UN International Conference on Population and Development, held in 1994. The report starkly highlights some of the statistics which clearly demonstrate that more action is required. Globally, one woman dies each minute from pregnancy-related causes, about 200 000 maternal deaths per year result from the lack or the failure of contraceptive services, at least 75 million of the 175 million pregnancies each year are unwanted, and rape and other forms of sexual violence are increasing, including in Europe.

These, and a whole host of other facts contained in the report, clearly point to a need for increased action and assistance to be given by developed countries to combating poverty and encouraging economic growth, with a corresponding increase in educational opportunities, particularly lacking in some countries, for women and girls. On the basis of the latest figures, the indicators for the Cairo conference objectives are still showing shocking inequalities between the world's wealthy and poor countries and regions. The EU governments can and should take a lead in improving the situation.
Queiró (UEN ), in writing . (PT) The Junker report must be viewed in terms both of what it states explicitly, but also in terms of what it implies. In other words, in addition to the attention that must be paid to the health of mothers and babies during and after pregnancy, or to basic precautions to prevent the spread of the Aids virus, the text – especially with the amendments tabled in committee – expresses quite a clear vision of women’s freedom and rights, specifically of those who need to receive all the means for ‘self-determination in family planning’. The report recommends that a policy should be adopted with the aim of increasing access to contraceptive methods and of making abortions easier to obtain by improving the conditions in which this takes place.

Two aspects of the text warrant some criticism; firstly, in order to reduce the number of births or to improve the sanitary conditions of these births, it fails to present and does even less to promote any alternative solution to the use of mass contraception, which is seen as a basic right. Secondly, the report even includes abortion in a number of measures to be funded, to which the EU is asked to contribute, without bothering to find out what the policies in at least some Member States in this field are. These are the reasons that have led me to vote against the report.

Ribeiro (GUE/NGL ), in writing . (PT) Almost ten years after the Cairo Conference, this own-initiative report providing an assessment proves to be timely, and the rapporteur emphasises this by calling for the debate to be held on 8 March, coinciding with International Women’s Day, particularly because the report is concerned mainly with women’s reproductive health.

The report is even more timely, we believe, for two reasons. The first is that, having just returned from the 7th Joint ACP-EU Parliamentary Assembly, we felt it was particularly significant that the report approved in that forum on poverty-related diseases should have included a recital on terminations of unwanted pregnancies and the need for these to take place in safe conditions. Secondly, because as a Portuguese citizen, these reports on this issue, chime with a very lively debate currently taking place in Portugal, in which a right-wing majority is obstructing debate and serious and humane decisions, using arguments and means that are truly disgraceful, not to say criminal.

Although this is clearly not the only theme of the report, we must use this explanation of vote to highlight the rapporteur’s statement that ‘abortion must not be regarded as a family planning method’, but also her call for ‘legal and medically safe interventions to be possible’. Anyone arguing the other side of the case finds themselves increasingly isolated, and sharing a stand with President Bush and his ‘Mexico City policy’.
Ribeiro e Castro (UEN), in writing. (PT) As has become the custom in Parliament, this report, like any other report on reproductive health in the developing countries, must be viewed both in terms of what it says outright and of what it implies. I am sorry that Parliament has not adopted our proposals, which were intended to clarify the concept of ‘sexual and reproductive health’, our guidelines in this field, or our concerns to prevent sexually transmitted diseases, including HIV/AIDS and to guarantee the safe conditions that women need for pregnancy, childbirth and postnatal care, in other words, to protect the health of mothers and babies during and after pregnancy. Instead, the confusion governing action in this field serves only to arouse suspicion.

I am also sorry to note the desire to commit the EU to promoting abortion on the international stage, demonstrated by the fact that another of our amendments has not been adopted.

Lastly, as I also said in the debate, I must distance myself from a biased report that ignores many of the main aims of the Cairo International Conference: economic growth, town planning, the environment, employment, holding fathers jointly responsible for women’s sexual health and education as a whole, in addition to education focusing specifically on sexual and reproductive health. I voted against.

Sacrédeus (PPE-DE), in writing. (SV) Together with the Group of the European People’s Party (Christian Democrats) and European Democrats, I have voted against the report as a whole. The report was, however, adopted (by 287 votes in favour, 196 votes against and 13 abstentions).

We want population, aid and development policy to combine the fight for democracy and human rights with respect for each country’s democratically decided legislation, in this case within the area of family and health policy.

The report does not express any such desire and perception, as exemplified by paragraph 20 with its demand for the ‘facilitation of medically safe abortions’. We demanded clarification of this paragraph by means of Amendment No 20, adding the words ‘in the countries where this is legal’. Amendments Nos 21 and 30, which I supported, were also designed to promote greater respect for other countries’ legislation.

These were nonetheless voted down (in the case of Amendment No 20 by 281 votes, with 207 votes in favour and 18 abstentions) on the basis of the majority view in Parliament that, in its aid efforts, the EU and the UN should not respect but, on the contrary, counter and actively undermine national legislation in a developing country that wishes to protect the unborn child’s right to life, including in its first weeks.

The EU and the UN thus show a lack of respect for other countries’ legislation. This undermines confidence in aid work, creates conflicts and clashes of
culture, religion and values and leaves a bad taste of self-styled European superiority in the mouth.

Sanders-ten Holte (ELDR ), in writing . – (NL) I should like to take this opportunity to express my agreement with Mrs Junker's original report. Unfortunately, the Group of the European People’s Party (Christian Democrats) and European Democrats has tabled a list of amendments which are not acceptable to my group. In Europe, it goes without saying that women are entitled to good sexual and reproductive health, and it is totally beyond me why the Group of the European People’s Party does not want people in the developing countries to be given the same. Moreover, President Bush's conservative administration, by reintroducing the Mexico City policy and continuing to make false accusations that abortion would be the UNFPA’s (The United Nations Population Fund) main objective, does rather complicate the work in the field of sexual and reproductive health care, and this should very definitely be denounced. Finally, I very much question the Group of the European People’s Party’s viewpoint that the family deserves all protection. What about the young girls and women who have been raped in war situations or otherwise? Or what about the women and girls who are forced, by their environment, and particularly by members of their family, to suffer sexual mutilation? Should we leave them to their own devices? My group does not think so, and has therefore voted against all these amendments.

Scallon (PPE-DE ), in writing . I have voted today against the Junker report which calls on the European Union and its Member states to integrate sexual and reproductive health and rights into their development policies.

The Cairo conference term 'reproductive health' was defined by the World Health Organisation as including the term 'fertility regulation' which includes the term 'interrupting unwanted pregnancy', i.e. abortion. Since the provision of abortion is not an EU competence and since the principle of subsidiarity is enshrined in the Treaties I have no choice but to reject this report. I believe that true women-oriented development would support women with safe gynaecological and obstetrical care, maternal care and childcare.

Food, safe water and health care are the prerequisite for education which, alongside sufficient energy supply and fair trade, will foster the long-term sustainable development of the individual and the society.

Bernié (EDD), in writing. – (FR) Two typical extracts from this resolution are enough to show that the aim of simplification and improvement seems to be out of reach.

That is what this third report has achieved. Recital A says: ‘whereas the quality and comprehensibility of Community legislation have a direct impact on the welfare and prosperity of Community citizens and businesses’, while we read in paragraph 6: ‘stresses Parliament’s right to call on the Commission to submit a draft legislative act in connection with the latter’s consideration of self-regulation practices’.

It will therefore once again be impossible for us to give our support to such a resolution. The Commission’s drafts are still basically bad. Parliament has been unwilling or unable to tackle the matter. It has remained a prisoner of the system and Community jargon.

Pasqua (UEN), in writing. – (FR) Yes, the quality and comprehensibility of regulations does have a direct impact on the welfare and prosperity of Community businesses. Of course, simplification of the regulatory environment means we must scrupulously check whether standardisation on a European scale is really necessary. It goes without saying that the institutions must seek to provide greater clarity of definitions and legal concepts. That is true, but if, as the rapporteur stresses, the Commission communication is a laudable demonstration of good intentions, just the same can be said of this report.

The simplification of the law is here only a pretext for Parliament, which is in reality only seeking to assert its usual claims. The opposition to any attempt to use the aim of improving the quality of legislation to make de facto changes to legislative procedures and the balance of powers between the institutions is proof of this. The same applies to Parliament’s request to monitor the appropriate choice and use of the legal instrument proposed by the Commission.

Everything is being done as if the intervention of this bulimic and power-hungry Parliament were a guarantee of wisdom or of legislative moderation.

Ribeiro e Castro (UEN), in writing. (PT) The main aim of this report is to contribute to improving the quality of regulations, an aim which cannot be overemphasised or taken too far. The rapporteur believes that there is a need to go further than the Interinstitutional Agreement ‘European Governance: Better lawmaking’, because the aspirations of the European Parliament have not all been realised. We must have clear, precise, simple and effective Community regulations and this is the raison d’être of this agreement. Let us not forget, however, that the European Parliament has direct democratic legitimacy, because its Members are directly elected by Europe’s citizens, who are those most affected by Community decisions.
The fever to legislate that we have seen, especially in the last decade, heightens the desire to increase Parliament’s role in the legislative framework. For this reason I support the rapporteur’s idea to increase the EP’s involvement in the spheres of co-regulation and self-regulation. Furthermore, this third report was adopted unanimously in committee.

Nevertheless, this report removes the flexibility and closeness that the interinstitutional agreement seeks to achieve, by assuming the means required to put these measures into practice. The a priori and a posteriori controls that it seeks to add do not warrant my support and I consequently abstained.

President. That concludes the explanations of vote.

(The sitting was suspended at 1.15 p.m. and resumed at 3.05 p.m.)

IN THE CHAIR: MR SCHMID
Vice-President

(1) Election of a vice-President: see Minutes.

Approval of the Minutes of the previous sitting

President. The Minutes of yesterday's sitting have been distributed.

Are there any comments?

Thors (ELDR). (SV) Mr President, I was not recorded as present in yesterday’s Minutes. Please excuse me. Can the matter be corrected?

President. That will be corrected (1)

(1) Approval of the Minutes of the previous sitting – Composition of Parliament: see Minutes.
Rights of Guantanamo detainees

President. The next item is the report (A5-0107/2004) by Mr Andreasen on behalf of the Committee on Foreign Affairs, Human Rights, Common Security and Defence Policy on the proposal for a European Parliament recommendation to the Council on the Guantanamo detainees’ right to a fair trial (2003/2229(INI)).

Andreasen (ELDR), rapporteur. – (DA) Mr President, Commissioner, the Group of the European Liberal, Democrat and Reform Party has always given the highest priority to the fight for human rights. It means a lot to us that individual persons each be guaranteed both their fundamental freedoms and their basic rights. It is therefore a special honour for me to be rapporteur for this report with a proposal for a European Parliament recommendation to the Council on the Guantánamo detainees’ right to a fair trial.

Everyone in this House agrees that international terrorism must be fought. There is therefore no intention behind this report to place a question mark over the fight against terrorism. It has been prepared in order to emphasise that, even in a just cause, there are some quite fundamental rules that have to be obeyed, namely respect for the individual person’s rights, as laid down in the UN Convention on Human Rights and in the Geneva Conventions. In this case, it is, as has already been pointed out, particularly a question of the right to a fair trial and to treatment in accordance with international law.

Since January 2002, approximately 660 people from 38 different countries have been held prisoner at the American naval base in Guantánamo Bay, Cuba. We know for certain that 87 of them, and perhaps more, have now been released, but by far the majority of them are still there. They do not know of what they have been accused, they have still not been brought before a judge, and no one knows whether or, if occasion should arise, when they are to be so. The detainees are in a legal vacuum. They are regarded either as ordinary criminals or as war criminals. As ordinary criminals, they should be safeguarded by American law but, according to a court of appeal in Washington, the naval base does not fall under American jurisdiction since it is not a proper part of the United States. Another court of appeal in San Francisco has rejected this argument, but this court of appeal is also the court in the United States whose decisions are most often overturned in the Supreme Court, so it is doubtful whether its pronouncement will be of any consequence. On its own initiative, the American Supreme Court has decided to investigate whether American jurisdiction should also apply to the Guantánamo naval base, and a response is awaited by no later than June of this year.

Nor, according to the American authorities, are the detainees at the naval base prisoners of war, and they are thus not protected by the Geneva Conventions, either. The detainees were not part of a regular army when they were taken prisoner. They had no rank or uniforms and did not openly bear arms. Instead,
the detainees are regarded by the American authorities as illegal combatants who do not come within known legal systems and who can be detained for an unspecified period without being tried or given access to lawyers.

That is the situation of the prisoners. They do not know what they are charged with, and whether or when they can be given fair trials. This is a clear violation of human rights and a breach of international conventions, and the report therefore requests the United States immediately to bring the detainees out of the legal vacuum they are in and guarantee them immediate access to legal assistance, which will clarify the legal status of each individual detainee. It is important to emphasise in this connection that the report applies not only to the European prisoners, but to all the prisoners and to their individual rights as human beings. The report supports the Council position according to which the Third Geneva Convention of 1949 on the treatment of prisoners of war is to be interpreted in such a way that, in case of doubt, the detainees at the Guantánamo naval base are to be treated as prisoners of war until and unless it is decided that they do not fulfil the conditions. Thereafter, they may, if occasion should arise, fall within either the Third Geneva Convention, which applies to legal combatants, thereby affording them status and protection as prisoners of war, or within the Fourth Geneva Convention, which applies to civilians.

In the report, we also request the American Government to confirm that the temporary military commission, set up in November 2001, is complying with all the international laws, just as we request the American authorities to give representatives of the states concerned and of international institutions, as well as family members and independent observers, access to the detainees as visitors.

The EU and the United States have always been allies. We have always had, have now and shall in the future retain a good relationship with the United States. The report states that the transatlantic relationship is invaluable and irreplaceable and could be a formidable force for good in the world, but only if basic human rights – such as the right to fair trial and the prohibition on arbitrary detention – are respected and remain the core values shared by the United States and the EU.

We therefore call upon the United States fully to comply with the obligations it has itself assumed in relation to international law and international humanitarian law. The report recommends to the Council that the issue of the conditions under which the Guantánamo detainees are being held be addressed at the summit that is to take place between the EU and the United States in June 2004. We want a common action plan for the fight against terrorism to be devised – an action plan that combines resolve and action against terrorism with full respect for international humanitarian standards.

I should like to thank my fellow MEPs in this House for the many positive contributions I have received from them in connection with this work and for the almost unanimous adoption by the Committee on Foreign Affairs, Human
Patten, Commission. Mr President, I would like to begin by congratulating the honourable Member on his report. It touches on an issue which is central to our concerns in the European Union, namely the protection of fundamental human rights. No-one in this Chamber doubts the vital importance of the fight against international terrorism, nor will or should any of us ever forget the horrible tragedy which we saw on our television screens when those planes crashed into the twin towers in New York on 11 September 2001. But we all understand the essential need to combat this evil in a way which strengthens the cause of freedom and human rights. The terrorists win if we lose sight of this fact.

The United States, as the honourable Member pointed out, detained several hundred men during and after the fighting in Afghanistan and some have been detained for as long as two years or slightly more. Some of them are nationals of our Member States but wherever they came from they need to be treated fairly and humanely, as the report says. We welcomed the release of a number of detainees recently and we look forward to the release of more in the future.

The European Union has been a staunch and committed member of the international coalition against terrorism. However, as the European Union has repeatedly underlined at both the sessions of the UN Commission on Human Rights and the UN General Assembly Third Committee, it is imperative that we and our allies uphold the values of international human rights and humanitarian law when fighting terrorism. The forthcoming session of the Commission on Human Rights will provide a further opportunity to tackle the issue of human rights and terrorism, and to build on the endorsement by the Third Committee of the proposal that the UN High Commissioner for Human Rights should examine the protection of human rights when fighting terrorism.

I need to make it clear – and I do so without in any way suggesting a lack of interest in this problem which rightly is of considerable concern to many Members of the House – that the European Commission does not have competence in a number of the areas which are raised in this report. In the absence of a common position on this question, it is for individual Member States to make diplomatic representation on behalf of their nationals. Equally, the question of the agenda for the US Summit is a matter for the presidency and for the United States. However, I am sure that the Council will take note of this report and of the strong feelings of many honourable Members on this subject.

The House is very keen to have answers to a number of questions. Are these men to be tried and if so for what crimes and under what jurisdiction? Are some of them to be released to the jurisdiction of their own countries, and if so, will guarantees be sought and obtained for their humane treatment? There are many
more questions which are raised by this case and are touched on in the report.

I want to make this clear: to ask these questions is not to question for one moment our strong partnership with our friends and partners in the United States in the fight against terrorism – terrorism which has a global reach. But one of our most potent weapons against this evil is our unshakeable commitment to the principle of freedom under the law.

We as Europeans must avoid the danger of raising these issues in a confrontational way which ignores the trauma which the people of the United States have suffered. That is why I welcome the fact that the honourable Member has raised this subject in his report in such a careful and measured way and I am glad to have had the opportunity to respond to him today.

It is crucial that we always try to keep in mind how the fight against terrorism and the promotion and protection of human rights impact on each other. We constantly underline that the fight against terrorism must be conditioned on maintaining respect for human rights, not the other way round. I would even go one step further. In my judgment, fostering human rights should become an integral part of the fight against terrorism. Only then can we hope to defuse the social tensions on which terrorism feeds.

Once again I would like to congratulate the honourable Member on his report. It raises issues of considerable importance. It raises the sort of issues which I have had to tackle before in other circumstances, for example in reorganising the police and security services in Northern Ireland and basing that reorganisation on the fundamental proposition that the forces of law and order are there to protect and maintain human rights and should have no truck with the undermining of human rights.

We all stand four-square in the fight against the evil of terrorism and the lethal combination of terrorism and technology. But we also, I believe, stand four-square in our belief that the best way of fighting terrorism is to retain a proper respect for human rights.

(Applause)

Ludford (ELDR ), draftsman of the opinion of the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs . – Mr President, the General Secretary of the American National Council of Churches has recently branded the denial of human rights at Guantanamo Bay as a sin against God. I do not take a religious perspective, but it is clear that it is not only Europeans who feel strongly that the situation at Guantanamo Bay offends against our sense of justice. One of the senior justices in the United Kingdom, Lord Steyn, branded the proposed military tribunals at Guantanamo Bay as a stain on US justice and the term 'kangaroo court' springs to mind. The British Court of Appeal has
branded the detention of prisoners there as a legal black hole.

The Bush administration has argued that the Geneva Conventions are obsolete when it comes to dealing with terrorists and has chosen to apply neither these conventional laws of war nor the criminal law in which human rights norms should apply, that is the International Covenant on Civil and Political Rights or the US Constitution. It has tried to straddle both by inventing a new, residual category of 'unlawful combatant' in the potentially unlimited war on terror, which is transformed from a metaphorical to a literal term. However, that status is unknown in international law.

Sadly, the denial of the prisoners' right to access to normal civil courts and the protection of the US Constitution has been backed by the US courts on the grounds that Guantanamo Bay – even though the US is in actual control of the base – is not sovereign US territory. But it is welcome that the Supreme Court has now said it would decide on whether the US courts have jurisdiction.

I would end by saying that I regret the absence of the Council in this debate since, as Commissioner Patten has pointed out, the Commission does not have jurisdiction, and the failure of the Council to adopt a common position and a strategy to implement the upholding of the rule of law in Guantanamo Bay is a sad omission.

Bremmer (PPE-DE ). – (NL) Mr President, Commissioner, this is an important report about an important matter, on which I am happy to speak on behalf of the Group of the European People’s Party (Christian Democrats) and European Democrats. I value the way in which the rapporteur has tackled the topic. It is positive that he, in line with my group's approach, has strengthened the foundation of this report. I should like to share with him my appreciation for the good working relationship.

This topic touches the very heart and foundation of our constitutional state. More than two years after the United States transported some 660 foreign detainees to Guantanamo Bay in the framework of the fight against the Taliban and Al-Qaeda, there is, unfortunately, still uncertainty: uncertainty about the charge, uncertainty about the duration of the detention, uncertainty about the possible judicial process, uncertainty about legal aid and uncertainty about contacts with the country of origin. In short, there is a legal void. The American Supreme Court is now looking into the question whether the American courts are competent to assess the legal status of the detainees.

Although the great effect that terrorism has had on our American ally in the wake of the dreadful attacks of 11 September speaks for itself, we are now a few years further down the line and the prisoners on the Cuban base have still not had access to the courts. This situation cannot, and should not, be sustained. Precisely because the transatlantic dialogue is so meaningful and irreplaceable, it is important to keep the lines of communication with our American friends
open. Allies are allowed to make urgent appeals to each other. I appreciate that the Convention of Geneva of 1949 is no longer fully adequate to accommodate new threats such as terrorism. It is important that international law should develop in such a way that a legal basis is in place for addressing new security issues. Even the worst terrorist is entitled to a fair trial. That is a basic principle underpinned by international law. I would mention by way of example both the habeas corpus principle and the need to properly safeguard the administration of justice, as well as, among others, such important treaties as the Universal Declaration of Human Rights, the European Convention on Human Rights, the International Convention on Civil and Political Rights, and the Convention of Geneva, to which the rapporteur has already made reference. All those treaties involve the task of guaranteeing a humane treatment of prisoners and the right to a fair trial. In the final analysis, this is about human dignity; every person counts. I gladly subscribe to what the rapporteur has raised in this respect.

Finally, I urge the Council to continue to bring the case of the Guantanamo detainees to the attention of the authorities of the United States. This case is deserving of this, and more.

Poos (PSE). – (FR) Mr President, Guantanamo Bay should send a message to all citizens who are concerned about human rights in the world. In this American concentration camp on Cuban territory, international law and American law have been outlawed to almost universal indifference. The whole world can see this place where there is no law, this legal black hole as Amnesty International calls it, but does nothing. Individual liberties won with great difficulty over hundreds of years have met their death on the beach at Guantanamo Bay.

As the victim of the 11 September attacks, the United States was perfectly within its rights to arrest, charge and try everyone presumed to have been involved in those attacks. But there was absolutely no need to act unlawfully, or to lock the 660 detainees in animal cages that are floodlit day and night. The days of the lawmen of the Wild West are over. Nowadays, no one should be able to set themselves up at one and the same time as accuser, defender, judge and executioner – you might as well say torturer.

Such, however, is the macabre scenario adopted by President Bush for his ‘offshore’ justice in Guantanamo Bay. With the allied governments wallowing in cowardly silence, it was time for the European Parliament to react in a credible and audible manner. Mr Andreasen’s report on the Guantanamo detainees’ right to a fair trial therefore comes at just the right moment and I congratulate the rapporteur on behalf of my group.

The resolution on which we shall be voting tomorrow is addressed to the Council and calls on it to adopt a common position on this serious violation of the fundamental principles of law. As Commissioner Patten very rightly pointed out, such a common position is very sorely lacking. But that call will doubtless
remains a dead letter so long as the absurd method of unanimous voting continues, allowing Europe’s voice on foreign policy and human rights to be silenced by just one dissenting vote.

Eriksson (GUE/NGL). (SV) Mr President, I should like to congratulate Great Britain which will today welcome home five of the British citizens imprisoned at the naval base in Guantánamo Bay. According to the Swedish media, they will be arrested and interrogated when they land in Great Britain this evening.

A further four Britons still in Guantánamo Bay will not be released, at least not yet. The Swedish detainee, Mehdi Ghezali, is also still there, with no immediate prospect of being released. That is how the situation has looked for more than two years.

Where the Swedish citizen is concerned, the Swedish Government indicated at the beginning that the issue should be taken up with colleagues in the Council of the European Union. Here we are today, more than two years later, and this is as far as we have got.

Like so many of these detainees, Mehdi Ghezali is young. The people concerned are young, and quite a few of them can even be regarded as children. Mehdi Ghezali’s family has heard nothing at all from him for 13 months. The officials from Sweden’s Ministry of Foreign Affairs who have been able to visit Mehdi Ghezali are not allowed to tell his family how he is. His lawyer has not been able to visit him, either.

Commissioner Patten said that we must have a good relationship with the United States. Yes, we must have a good relationship with the United States, but we must also have good relationships with all other nations. I think that the old saying, ‘It takes two to tango’ is apposite in this case. The United States’s conduct on this issue does not, unfortunately, encourage much in the way of confidence. Of course we remember 11 September, but I also remember the pictures that, in spite of everything, have come out of the base at Guantánamo Bay, showing young people sitting handcuffed in cages.

We are committed to human rights. We cannot just have debates at regular intervals about them. They must also mean something, and I therefore wish genuinely to thank Mr Andreasen for a very good report.

McKenna (Verts/ALE). – Mr President, I too would like to congratulate the rapporteur. This is a very important initiative and this is an opportune time for it to be brought forward. The existence of internment-without-trial camps in Guantánamo Bay has to unacceptable to anyone in a civilised society. Any prisoners captured during the invasion of Afghanistan should have been treated according to international law and, at the very least, should have been classified as prisoners of war. They have the right to a fair trial. They should also have the
right to be considered innocent until proven guilty in a court of law, have access to legal representation and have the right either to be charged or released.

The Irish presidency should be doing everything in its power to ensure that these people are not denied their basic human rights for a minute longer. I agree with what Mrs Ludford said concerning the failure of the Irish presidency to be here today, which is an appalling message to send out to the European Community and indeed to the international community. As Commissioner Patten said, it is up to the Council to raise this matter with the United States, and the EU Council has failed abysmally to do so on any occasion. I would also question why it is that the Irish presidency is not here today. Is it because that presidency is afraid of offending the United States by saying something at that country would take offence? The Irish presidency is also letting down the Irish public, which views this matter as an absolute scandal.

Camre (UEN ). – (DA) Mr President, I find it strange that the European Parliament should be so busy with these efforts on behalf of enemies of democracy. The detainees are not a bunch of scouts that have got lost on an outing. All the evidence suggests that the detainees have been treated humanely. Pictures from the naval base show cells considerably better than those in many of the EU countries’ prisons.

It is only a few of the EU Member States that are actively participating militarily in the fight against the reactionary forces that would use terrorism to change the direction in which the world is moving. That is a fight we leave to the United States and its true allies. To listen to some of those with a professional hatred of the United States, one would imagine that, in their view, the Taliban and al-Qa’ida are a species of freedom fighter who wish to help poor and oppressed peoples. They are the opposite. The terrorists must be given the kind of fright that will deter them from continuing with their criminal acts. Only by crushing their networks can freedom and democracy be developed in the world.

The detainees at the Guantánamo naval base are not soldiers in an organised army. They are not an underground movement in an occupied country. They are terrorists who fanatically oppose the human rights that some in this House now believe they should enjoy. Some of the prisoners have acquired citizenship of EU countries. When, subsequently, they take part, with or without visible weapons, in an armed struggle in which some of our soldiers are killed, then they are traitors and must be treated as such. I am certain that there are EU countries which would not have shown the United States’s forbearance, but would have shot a whole lot of them on the spot. It is unfitting that we, who are not waging war in Afghanistan and who have not ourselves been exposed to genuine terrorist attacks in our countries, should think we should tell the United States what to do.

I wish to thank Commissioner Patten for making it clear that the Commission
has no competence in this area and add that the Council has no such competence either. I wish to recommend to Parliament that it vote against the report.

Tannock (PPE-DE). – Mr President, September 11, the attacks on the twin towers in New York, opened up a new chapter in the concept of war – namely, an asymmetric, large-scale attack by a well-organised and well-resourced, fanatic, international, Islamist grouping affiliated to al-Qa'ida, with no respect for the traditional rules and conduct of war as we know them and very difficult to formally classify under the Third and Fourth Geneva Protocols of 1949. Therefore, all the demands made by this resolution to treat the detainees either as innocent bystanders caught up in American crossfire in Afghanistan or common-law criminals subject to due process are legally not sound, and not necessarily desirable either – particularly if we are to protect Europe's security and people from further attacks. Also, the state's first duty is always to protect its innocent citizens from future attack from any such terrorist groups.

The US would not waste valuable public resources detaining those who pose no security risk. Indeed, after exhaustive enquiries, many have been returned home, including three juveniles – one who in an interview to the British press testified to the humanity of his captors and was grateful for formal English-language instruction on the base. The rest – including the EU citizens involved – are undoubtedly dangerous or a source of ongoing useful intelligence and should either be tried for war crimes, if appropriate, at standards compatible with international norms or held in humane conditions as illegal combatants for the duration of the war, with Red Cross and consular access, until Mr Osama bin Laden is captured and formally surrenders his terrorist network and their declared war on the West.

I do not accept that habeas corpus applies in emergency situations like times of war or national emergencies, so its inclusion is totally inappropriate. No prisoners of war during the Second World War were allowed to have a fair trial – everyone knows that they were detained for the duration of war. Furthermore, historically, citizens of any country – and the UK in particular – who in times of war went abroad and fought against their own armed forces or their allies were potentially indictable for treason, historically a capital offence and even today a very serious offence. Therefore, the Liberal motion before us today will not be supported by me, as its primary purpose is to bash the United States of America in its global war on terrorism.

Cashman (PSE). – Mr President, I shall not respond immediately to Mr Tannock, but will begin by stating dispassionately that the notion of human rights, including the right to a fair trial, is the highest priority for all the parliamentary groups.

Terrorism and terrorist groups have won when the rule of law is set aside. Mr Camre, the rule of law is not an enemy, but the basis of a civilised society.
When you discard it, you discard your civilised rights. One has to look at the charges brought against these individuals. If charges had been made, then they would have the right and the opportunity to defend themselves, but no charges have been made. Three of my constituents are amongst those about to be released. What of their families? What of their concerns? What of their human rights? I start, as I believe everyone in this House starts, from the notion that people are innocent until proven guilty. The two previous speakers would seem to accept the opposite.

The calls made in this House are not anti-American. Indeed, we have asked the United States to uphold the rights of the free world which are at the heart of its own constitution. Here we come to the crux of the matter: the argument that somehow these people are outside US national jurisdiction. They are not, and it was on this basis that the Supreme Court petitioners called for the releases of detainees that we have seen recently.

They should be subject either to US law or to the rule of international law: legal representation, a fair trial and the right of appeal. It is in exceptional circumstances that the unexceptional, normal and rational rule of law is most needed. Mr Camre, I cannot agree with you. You have denounced these people and even you will not give them a fair trial. We must never forget that 11 September altered the American psyche forever. Hence the actions that have been taken. This House has therefore chosen a noble route: not to condemn, nor to cast out those who have been detained – perhaps in horrific circumstances – but to ask quite simply that the rule of national or international law be upheld and fully respected. I, the PSE Group, the ELDR Group and other Groups will uphold those principles. It is a sad day when all the Members of this House cannot do the same.

(Applause)

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Wuori (Verts/ALE). – (FI) Mr President, Guantanamo is not war, but a return to tyranny by a sovereign ruler, as now symbolised by the logic of a permanent state of emergency championed by the world’s only hegemonic superpower. The pressure being put on the principle of the rule of law this way may gradually crush the whole legal tradition we have had so much difficulty achieving. This is a historic challenge.

Fortunately, regarding the cases of Mounir El-Motassadeq and Abdelghani Mzoud, the courts in both the United States of America and just recently in Germany have stood up for the most fundamental human rights principles of all, one of which is the right to a fair trial. This illegal confinement is not in America’s interests, but only makes the legitimate fight against terrorism more difficult. That can only succeed through cooperation and lawful courses of action, and it is actually giving into terrorism to ignore them. It is a dangerous signal in every respect.
De Rossa (PSE). – Mr President, it is absolutely unacceptable that more than 600 people, including children, have been held for two years in Guantanamo Bay without charge or trial, in circumstances which no democratic state could legitimately stand over. It is a recipe for feeding hatred, not for coming to terms with the awfulness of terrorism.

This is a debate about defending democracy and the rule of law, and an appeal to the good sense and the democratic instincts of the American people in circumstances where good sense and democratic instincts are all important. It is right and proper to condemn and continue to condemn the atrocity of 11 September 2001 and all other atrocities engineered by terrorists, whether in the United States or in Europe, in Spain, Ireland or indeed in Israel or the Palestinian territories.

Terrorism deliberately sets out to destroy freedom: its purpose is to destroy freedom. If we attempt to undermine the terrorists by using means which themselves destroy freedom, we undermine the very foundations of our own society. If we go down the route of denying basic human rights and basic democratic rights to those we suspect of terror, then we are giving them a victory and we are shaping a society which in the long run will not be in the best interests of the people of this world who want to live in a sustainable peace. I would appeal to the Irish presidency to put this matter on the agenda of the EU-US summit in June this year.

Lambert (Verts/ALE). – Mr President, one of the interesting things in the discussion on Guantanamo Bay concerns language, not least the new definitions of war that we begin to hear, which have no legal basis in any international jurisdiction.

Mention has already been made of the UK releases today, and of course I welcome that development, but I am also interested in who is defending the interests of the remaining detainees, whose governments may not have a special relationship with the United States. I welcome this report because I think it is very important to keep the whole issue within the international arena.

As others have said, we have seen a deliberately created legal limbo here, which has provided a green light for other regimes to act in similar ways now, not least China, Yemen, Uzbekistan, Saudi Arabia and other well-known democracies, with their policy of internment of so-called fundamentalists. We have seen the United Kingdom derogate from Articles of the European Convention on Human Rights in order to legitimise the internment in Belmarsh of UK residents. It is important to respect the rule of international humanitarian law, even when it is inconvenient for governments.
Mr President, I was surprised to hear a few minutes ago that Guantanamo Bay was a centre for English language teaching. That is quite extraordinary because the holding of the prisoners in Guantanamo Bay runs contrary to human rights. The prisoners have no access to an independent lawyer, and we do not know who exactly is being held or what precise charges are being brought against them. Under such conditions, there is reason to be concerned about the detainees’ mental health.

Without the prior assistance of an independent lawyer, we can say that there is an obvious risk of negotiation to reach an agreement and doing so in order to get the charges reduced. If that is the case, detainees will be able to choose to plead guilty, even if they are not, in order to escape the death penalty. It is clear that President Bush and the US leadership want show trials with confessions because it is presidential election year.

The European Parliament’s position must therefore be intransigent against terrorism, but also intransigent on respect for international law. It is unacceptable to sentence someone before a verdict has been reached. That is what is happening here, sometimes even in this Chamber. We must all therefore denounce this legal black hole in which the detainees find themselves.

We can all remember the horror of what happened, but we do not want terrorism to win and we must demand fair treatment for all and show that we defend values that respect the law. Ladies and gentlemen, that is the best means we all have of combating barbarity.

President. The debate is closed.

The vote will take place tomorrow at 12 noon.

European Partnerships under the Stabilisation and Association Process


Verheugen, Commission. (DE) Mr President, ladies and gentlemen, I would first like to thank Mr Lagendijk very sincerely for drafting the European Parliament legislative resolution on the Commission's proposal for a Council regulation on the establishment of European Partnerships in the framework of the Stabilisation and Association Process.
The amendments proposed address some of the key points in our relations with the Western Balkan countries. We have noted all the proposals and carefully considered them. The Commission and the Council need Parliament’s full support and commitment in their efforts to assist these countries with their reforms and in bringing them closer to the European Union.

Let me briefly describe the background to this proposal for a Council regulation on the establishment of European Partnerships, which goes back to the European Council held in Thessaloniki in June 2003, at which the Heads of State and Government reiterated their determination to fully and effectively support the European perspective of the Western Balkan countries. The Stabilisation and Association Process has now been strengthened and supplemented by several elements that have been implemented in the course of the ongoing enlargement process. The introduction of European Partnerships is one of the most important proposals to this end. The Commission was requested to present the first European Partnerships for approval at the end of this month, together with the next Annual Reports on the Stabilisation and Association Process. Like the Accession Partnerships for candidate countries, the European Partnerships establish short- and medium-term priorities that those countries are required to comply with in order to move closer to the European Union. They will be adapted to the countries’ specific needs and respective stages of preparation, and to the specificities of the Stabilisation and Association process, and will also take account of regional cooperation. In accordance with progress achieved, the European Partnerships will increasingly be steered towards adoption of the acquis. Progress will be monitored by the Commission and assessed in the annual reports. The texts of the individual European Partnerships will be transmitted to the European Parliament, and, exactly as in the case of the Accession Partnerships, the European Parliament will be kept appropriately informed about the progress made by the countries concerned.

The Commission has noted the rapporteur’s comments about financial assistance for countries in this region. I would like to stress once again that the proposal does not have any financial implications. The priorities of the European Partnership will continue to form the basis of the programme of assistance, which will be provided under the CARDS programme. I should, however, emphasise that the Partnerships have their own priorities, the achievement of which has no financial implications whatsoever, such as the acceptance of legislative provisions.

I fully understand Parliament’s concerns about the conditionality of Community assistance. Respect for the principles of democracy and constitutionality, and for human rights, minority rights and fundamental freedoms are a prerequisite for the granting of Community assistance. If these general conditions are not met, the Council can decide to suspend financial assistance. The Commission has agreed to make specific reference to this point in draft Council decisions on the individual partnership priorities. The priorities of the European Partnerships are just as much EU priorities as the priorities for Accession Partnerships were for the accession countries. Of course, the governments of the countries concerned
will be informally consulted on the European Partnership. Their agreement will not come as a surprise. The Commission agrees with Parliament's proposal that a passage on the consultation of the national governments should be added to the regulation.

In the context of the mechanisms established under the Stabilisation and Association Process for this purpose, we have regular contacts with these countries. We assume that these countries are working out plans setting out a time frame for compliance with the requirements for further integration with the European Union. This work is intended to give them an increased sense of responsibility and a better understanding of the process. Implementing the priorities of the European Partnerships requires commitment, political will and the provision of appropriate funding. The partnerships will provide a solid basis for steering the reform efforts in the Western Balkan countries to moving closer to the European Union.

Lagendijk (Verts/ALE ), rapporteur . – (NL) Mr President, before I discuss the Commission proposal, I should like to ask whether we ought to attach any political significance to the fact that Mr Patten has left the Chamber and has been replaced by Mr Verheugen, because as far as I know, Mr Verheugen is still responsible for candidate Member States and acceding countries. Is this an indication from the Commission that the Western Balkan countries, although, officially, they are not yet among candidate Member States, have now suddenly been included among their number? Let there be no misunderstanding: I would welcome it. It is, in any case, striking.

As far as the proposals themselves are concerned, the Commissioner has already referred to their source, namely last year's Thessaloniki Summit. At that summit, the European Council, under considerable pressure from the Greek Presidency, wanted to make a gesture towards the Western Balkan countries, the most important political message being that they have very definitely turned into the road to Europe and that the EU wants to help them on that path by offering them an additional instrument in the form of European Partnerships. The reason for this initiative was that there is no doubt, including in this House, that those countries will be members one day. The question is only when and under what conditions. However, when I read the Commission proposal implementing the fine decision of Thessalonica, I am, quite honestly, very much starting to doubt whether that decision was such a wise one. What is – and that is at the same time the central question in my report – the added value of introducing a new instrument, namely the European Partnerships, at this present time? We in the European Union – you know this better than we do – are involved in an extremely complicated process of concluding Stabilisation and Association Agreements with all the countries of the region, or at least, that is the goal towards which we are working. We managed to do this with Croatia and Macedonia, and we are still negotiating with the three other countries. This process is jerking along. It is not easy. There are still major problems in three of
the five countries, and there is still a great deal of work left to be done.

Now all of a sudden, in the middle of that process, along comes a new instrument, the European Partnerships. These do not follow the Stabilisation and Association Agreements, but cut right across them. Commission, I really have to say that I fail to grasp the meaning of this; I think that the Commission, like Parliament, is bound by the Council's brief, although it, like we, cannot say so out loud. I fear that the new instrument that has been created is one that nobody needs and for which nobody is waiting. It creates uncertainty in the region and I think that we have to be very careful not to hand those countries an empty shell, while we ourselves are unsure as to what we want from this initiative. Here, politics is being played with symbols, and we have to tread very carefully indeed.

If we persevere with this initiative after all, I should like to make two observations. First of all the finances which are normally speaking part and parcel of partnerships such as these – suffice to look at the great example of these European Partnerships – namely the partnerships that have preceded the status of candidate Member State. If we create a new instrument after all, why do we not set aside some new money at the same time? Your colleague, Commissioner Patten, has repeatedly told this House that, as far as he is concerned, it is no trouble to spend the money that he now has at his disposal, and that he would like to receive more money from Parliament in order to help those countries. That is why I can accept the concept of European Partnerships, provided that it is clear how much money we are willing to contribute. If no additional funds are being set aside for this than are already available, then the whole initiative is nothing but an empty shell.

What is more important is the conditions. The new instruments should not impose yet another set of new conditions. We have subjected EU assistance to those countries to very strict conditions as it is: the return home of refugees, the fight against corruption and cooperation with the Tribunal in The Hague. I urge you to leave it at that. Whilst I am pleased that the Commission has stated in this context that the existing conditions will not be changed, this should be made sufficiently clear. The new instruments should not involve any new conditions. I am, however, very much in favour of the European Union adhering to the existing conditions to the letter, because now and again, I have noticed in the Council a tendency to go over these lightly and not to adhere to the criteria that were established in the past. This is, however, necessary. The root-and-branch approach has to be adopted, because the problems in that region are extensive and if we create the impression that the countries in question will automatically become members at some point, things will go wrong. Let it be clear: I am in favour of carrying on, of giving the reforms and reformers my warm support. The European Union has no choice but to back those countries and the pioneers who carry out reforms. If we need new instruments to achieve this, so be it, but if we can make a good deal of progress with the present instruments, whilst the new ones only create uncertainty, I will reject the new ones.
Mr President, Commissioner, ladies and gentlemen, our external policy in relation to the Balkans is an inevitable consequence of the enormous mistakes we made at the beginning of the 1990s; at that time we did not have a common policy for this region, but today we do.

The Stability Pact is the right answer to the region's problems. The negotiation of the Stabilisation and Association Process, together with financial assistance such as the CARDS programme and the annual progress review, assists progress towards the frequently mentioned objective of the ultimate accession of these countries to the European Union. So this is the right way to go. What then is this new cliché about ‘European Partnership’? The Stabilisation and Association Agreements are the launch pad for a partnership and if all the criteria are met, the application for membership is the next step. Is there any room for a new catchword without any new financial backing? This proposal from the Council is meaningless, and the Commission knows that, but it cannot say that in so many words. We, on the other hand, can say what we think!

Commissioner, the Commission and the Council could demonstrate how serious they are about this much-vaunted partnership by taking Croatia as an example. Croatia has been on the right path for years. Cooperation is good in all areas. The extent of cooperation with The Hague is also positive. Two more generals have just been sent to The Hague. We should not be setting ever-higher standards just because one general with a French passport is still at large and is nowhere to be found. We should remember what has been achieved already. This positive view of Croatia would give a signal and add impetus to compliance with the European Union's criteria throughout the region for which European Partnerships are envisaged – and I know what I am talking about. Our common foreign policy in South Eastern Europe is currently being put to the test, and a rigorous one at that. The proposal for a European Partnership without any substantial added value as compared with the Stabilisation and Association Process and without any additional financial assistance will not, I regret to say, enhance our credibility.

Mr President, Commissioner, ladies and gentlemen, everything that Mr Lagendijk and Mrs Pack have said actually militates against the adoption of the Lagendijk report. I personally will not be voting for it; not because I think that Mr Lagendijk's report is a bad one, but what sort of a parliament is it that attacks the Council and the Commission over their proposals and then says, fine, but because we are a parliament we will vote for them? I, for one, will not be voting in favour, and I say that because I believe that, although the arguments put forward by Mrs Pack and Mr Lagendijk are valid, an instrument has been dreamt up here without any real foundations.

I can well imagine that something could be made of the European Partnerships, but clear objectives and criteria need to be set. However, the present proposal at least contains nothing of the kind. I hope that Commissioner Verheugen will.
push for that, as I am assuming that he will play a key role in the new Commission – he certainly deserves to – and I assume that he will also have a corresponding influence in ensuring that the European Partnerships become an instrument based on clear criteria. My recommendation, which was not accepted by the committee, was that the Stabilisation and Association Agreements should be successfully implemented over a period of years. Successfully, mind you, not just any old how!

My visit to Kosovo as part of the delegation led by Mrs Pack made a lasting impression on me. That impression is that neither the Albanian side nor the Serbian side have come under enough pressure to do what they ought to do – to work together for the future of Kosovo. That impression also applies to several other countries. But Croatia, both under the previous administration and under the present government, is an exception to that, because they have grasped what is at stake and also wish to move forward accordingly.

The Commission and we in this House bear a certain part of the blame for this situation, and we should endeavour to ensure that Europe's voice is heard more clearly and distinctly.

Our meeting with President Rugova was symbolic of this. I have a high regard for him and have known him for a long time, although not so well as Mrs Pack does, but I have a very good relationship with him. But when we visited his official residence – and I know that we are only talking about Kosovo and not yet an independent state – Albanian, Kosovan and American flags were flying, but not a European flag, and nobody seemed to think anything of it. What does that say about Europe's voice, I wonder? We will be taking him a European flag in the hope that it will find a place at his residence.

He is not the only one, however, to whom this applies, and this is in no way intended to be a personal criticism. I believe that just as Europe is not represented amongst the flags flying at his residence, Europe's views are unrepresented or at least underrepresented in many parts of the Balkans. The Council, the Commission and Parliament must work together to make our voice more widely heard.

Commissioner Verheugen, if we are debating this in a year's time and you can convince me that the European Partnership has achieved this much, or has at least made progress in that direction, then I will support the Lagendijk report retrospectively, but I shall not be voting for it tomorrow.

Verheugen, Commission. (DE) I ask the Members of this Parliament not to draw any particular conclusions from the fact that I am representing Commissioner Patten here today, but it has worked out rather well, as I am perhaps in a better position than he is to respond to your comments. What, then, is at issue here? The issue is that the Thessaloniki Council asked whether we could not draw a few conclusions from the successful progress of the
enlargement process with a view to bringing the countries of the Western Balkans closer to the European Union more effectively.

The question was a simple one: are there lessons that we have learnt, are there instruments that have been successful in that process, and which we could apply here as well, subject to any necessary adjustments? The answer to it is ‘yes’. In the case of the accession countries we had the ‘Europe Agreements’ as a legal basis. These correspond to the Stabilisation and Association Agreements with the Western Balkan countries. We developed the ‘Accession Partnerships’ as an instrument for implementing those Europe Agreements, and I will tell you in a moment why that was a good thing. The corresponding instrument in the Stabilisation and Association Process will be the European Partnerships, because we could not very well talk about ‘Accession Partnerships’.

The great advantage of this instrument is that it is very flexible, very exact, easy to monitor, and that progress can be assessed very precisely. It is the Commission's intention to prepare these partnerships following exactly the same pattern as for the Accession Partnerships. That involves describing in precise terms what is to happen in the first year, as a short-term priority in other words, in all areas – political governance, economic governance, adoption of the acquis – and then medium-term priorities, for which we will give ourselves two or three years, and lastly the long-term priorities. The big advantage of all this is that it can be checked and fine-tuned at any time, and that the other instruments at our disposal can then be adjusted to meet the objectives of these partnerships, for example the technical assistance instrument that we intend to use in future. But I also have in mind the instruments already at our disposal and all the other instruments available.

I can tell you from my own experience of the enlargement process that this instrument will be helpful, that it is a very manageable instrument, and one with which we had very good experience during enlargement. I therefore urge you to at least give this instrument a chance. I would like to ask my friend Mr Swoboda to perhaps give the instrument two chances, and in a year's time we will be very happy to carry out a joint assessment of whether or not it has achieved anything. I am quite convinced, though, that it is an instrument that will help the Western Balkan countries, which will be more manageable for them, and which will make the direction in which the whole process should proceed clearer and more credible. For that reason I can indeed give this instrument my wholehearted support.

President. Thank you, Commissioner Verheugen.
Mr President, Commissioner Verheugen has won me over. I will be voting in favour. I trust him to do the right thing, and hope that he will do so.

Mr President. I did suspect this was not going to be a point of order. As I know you, it does not matter; today is one of my good days.

The debate is closed.

The vote will take place tomorrow at 12 noon.

The next item is the joint debate on the following three recommendations for second reading on behalf of the Committee on Culture, Youth, Education, the Media and Sport:


- A5-0077/2004 by Mrs Iivari on the Council common position for adopting a European Parliament and Council decision establishing a Community action programme to promote bodies active at European level and support specific activities in the field of culture (15331/1/2003 – C5-0023/2004 – 2003/0115(COD)).

Mr President, Commissioner, I rejoice that we are now at the start of the final stage of a short but intensive process. We are able to complete the programme and thereby guarantee that young people and youth organisations will be able to implement their programmes. This has been a very intensive period and we have again been under pressure of time. I would like that to be different for new programmes in the future, so that we have a bit more time available for more precise elucidation of the individual positions and more opportunities for discussion.
What this is primarily about is supporting youth groups, something that must be of particular concern to us if we want to build up confidence in Europe or in the European Union, for then it is young people who best understand Europe and who are least likely to have problems when it comes to abandoning their prejudices. Because that has to be encouraged, they also have to be got more involved in the European process. There are various ways in which this can be done: one central office is the Youth Forum, which maintains contacts in the various countries and does many difficult, necessary and useful things alongside young people, enabling them to live in democratic association within Europe and beyond it.

Today we are debating three reports; although this is a joint debate, they cannot all be considered in the same way, as their substance has to do with different responsibilities, which need to be taken into account appropriately. It has been proposed that the action programmes be harmonised as regards the long-fought-for share of cofinance, the principle of degressivity, and their duration. It will, no doubt, be very difficult in practical terms to have them running until 2008.

We have had lengthy talks about the 20% equal share in cofinance, which will not quite work, as several organisations, especially in the educational sphere, get such minimal support that further cutbacks would mean that support would effectively lapse. For youth organisations, then, the figure 20% is just about acceptable, as finding sponsors is a recurrent problem. Businesses are unable to devote themselves to young people on top of the economic situation. Organisations in many other areas of activity find it significantly easier to find sponsors than do those dealing with young people, which is why the latter need our particular support.

I would also like degressivity, according to which two and a half per cent of the previous year’s grant is to be retained from the third year onwards, to benefit the groups and youth organisations that have not been covered by that date. This will become particularly important in the aftermath of enlargement. After 1 May, there will be more young people for us to reach. We have to invest more and we have to give them strong support.

Those youth organisations whose aim is to advance international dialogue among young people and to present information on relevant topics to as large a young public as possible are also conduits for the European Union’s views. What matters is not just promoting young people’s interests, but also communicating material that relates to what they are interested in. Whilst we have to take their interests into account, they also themselves have to make their own contribution and thereby further reflect the whole range of European policy to their fullest extent. The future of the European Union is in the hands of young people, and we should not forget that.
Pack (PPE-DE ), rapporteur. – (DE) Mr President, Commissioner, today’s debate on these three much-needed programmes finds us seeking a common legal base for the areas of culture, education and youth. We have had a concertation procedure – I am grateful for the very fine support we got from the Committee on Budgets in that – and now we have some fairly substantial financial resources at our disposal. We could, of course, do with more – these are, after all, areas in which we are dealing with the public, and in particular with young people – but we can be satisfied with what we have. As far as my own area is concerned, I can tell you that EUR 77 million for the action programme for educational institutions is not a trifling amount, but, again, we could do with more.

Within all three of these areas there are institutions and associations that are, putting it in the broadest possible terms, educational and cultural ambassadors for Europe and which promote awareness of Europe’s common cultural heritage. For years, often with the help of this House, all these organisations have been doing their work. Without them, Europe’s soul would atrophy even more than it is apparently slowly doing now. I am especially glad that Mrs Iivari has been able to gain acceptance for the idea that cultural institutions should be able to retain their subsidies, at least for a transitional period of two years. Among other things, this is an acknowledgement of these organisations’ work. They can then prepare themselves for the applications they will have to make in response to future invitations to tender.

It is at this point that I would like to stress that we MEPs are of course closer to the public than are those who sit in the Commission in Brussels, and so it is a fact that we are more aware of what the public needs.

There are three points I would now like to make. As for the first, I would like to take this opportunity to shed more light on the Financial Regulation. Under no circumstances must the lawyers’ mania for regulation be allowed to obstruct our striving for greater transparency and efficiency in our political work on the ground, and I know that the Commission suffers from it just as much as Parliament. The Council, having absolutely no interest in such things, does not, but the problem is that we have the impossible task of defending these things on the ground. Let me just say, with reference to this, that this Financial Regulation and the Commission have now – to take just one example – wrecked the network of Europe Houses that has existed for 50 years. There is a place for that in this debate. I also want to point out that in respect of neither 2003 nor 2004 has the Commission been able to pay to this network the sums of money that this House allocated to it. It is refusing to do so. It is not Mrs Reding who is to be blamed for this, but others; the point simply has to be made that it is the Commission’s fault.

It may be that the Financial Regulation that we now have was necessary. The only thing is that it cannot stay the way it is. We have to recognise that a rigorous, not to say fundamentalist, interpretation of this Financial Regulation gives rise to a bureaucracy that distances the public even further from the EU.
How are members of the public meant to submit applications if they have to get a consultant to do it for them? It is scarcely credible that all these things should have become so complicated. We must not allow ourselves to be taken hostage by a sort of budgetary imperialism. We should make a real attempt at changing something, and, in the new parliamentary term, join with the Committee on Budgets in finding a new approach.

We are neither an assembly of managers nor a board of directors seeking the maximum in bureaucratic efficiency. Rather than being either of those things, we are a political assembly, and our principal task is to respond to the European public’s desires and needs. It is for that reason that I believe we have to make it our business to ensure that money is spent properly, but we must not allow ourselves to be tied into a corset that nobody will find it easy to get out of.

My second point is that we expect more from the soul of Europe, and so future budgets need to take more account of education and culture.

The third, Commissioner, has to do with the new generation of educational and cultural programmes that you want to speak about today. My expectation of this new generation of programmes is that they should include manageable instruments, by which I mean action at Community level that is capable of being practically implemented, equipped with operational and financial resources in line with what the public want. Everything we do must focus on the public, and let me once again stress that they must not be used as a justification for bureaucratic machinery.

Iivari (PSE), rapporteur. – (FI) Mr President, Commissioner, it comes as a relief that the subject of our debate is the common position with regard to financing European cultural organisations and networks. A decision on the issue must really be taken now, so that the organisations that are entitled to funding receive their grants starting this year. I wish to sincerely thank all those whose cooperation in conciliation led to our success at the end of last year. Terence Wynn, the Chairman of the Committee on Budgets, and many others helped enormously. My own collaboration with the Commission and the Council has gone well at the various stages of the process.

The Commission proposal for an action programme to promote bodies active in the field of culture became necessary when we switched to an activity-based budget. The cultural organisations, which were formerly financed out of Budget Line A signifying administrative expenditure, need a legal basis for their funding to continue. With the compromise arrived at in conciliation, financing will now be based on a period of three years. During the first two years there will be compliance with the decision made by the Committee on Budgets last autumn regarding beneficiaries, which is to say earmarking; the third year will see a switch over to open application. The legal basis now coming into existence will also permit the financing of the work of the European Bureau of Lesser-Used Languages and the Mercator network, as well as concentration camp sites.
as historical memorials. The programme’s total budget is EUR 19 million.

When the Commission proposal was being discussed it was evident, for example in the view of all the institutions’ legal services, that the earlier procedure, in which Parliament mentions organisations to receive grants by name, does not accord with the new Financial Regulation. I myself am also in favour of the open application method as a matter of principle. Parliament is a legislative body and it is not for us to name individual beneficiaries. It does not meet the requirements of transparency and good administrative practice. Parliament lays down guidelines and evaluates decisions made by the Commission on the basis of reports.

Having worked closely with European cultural networks for almost five years, I am convinced of the European added value they produce. It is immensely important that experts and creative people who work in or for museums, cultural administration, art colleges, schools, the theatre and music have an opportunity for cooperation. I believe that cultural networks have an important contribution to make to the success of European enlargement. They are not only important heralds of the diversity of our common European cultural heritage and civilisation but also creators of new ideas. I believe that now that we are finalising a legal basis for funding for three years we can get off to a good start by making sure of the survival of European-wide cultural networks. I am very pleased that the importance of European cultural and educational cooperation is being highlighted in the Commission proposal as a new financial framework in the building of Europe’s future. My warmest thanks and congratulations go to Commissioner Reding for that.

Reding, Commission. (FR) Mr President, ladies and gentlemen, new obligations under the Financial Regulation adopted in 2002 are the reason for our debate today. This new Financial Regulation now provides a clear legal framework for the subsidies we give to a large number of leading European organisations in the fields of culture, youth and education.

There will now have to be a legal base for all funding decisions. That is of course a step forward and I am pleased about it, while noting, as Mrs Pack has said, that there are some perverse effects and I very much hope we shall find solutions in talks with the budgetary services of this House.

The changes that have been made led the Commission to present proposals for a new legal base in spring 2003. Those proposals concerned in particular the fields of culture, youth and education. They sought to ensure a smooth transition between the old system and the new, and we have tried to ensure the necessary continuity while being irreproachable in terms of the proper use of public funds.

Today I am grateful to the European Parliament and to Mr Rocard and his committee in particular for recognising the urgency of the matter and allowing the Commission’s proposals to be examined quickly. It seems to me that the
most important matters have now been settled and I am therefore pleased that we are moving towards a compromise, which shows the European institutions’ determination to find a solution as quickly as possible when that is necessary.

For want of a legal base, we have in fact been in a legal vacuum since 1 January 2004 with regard to organisations whose know-how and creativeness are well known, organisations which the citizens need if they are really to be able to operate in a European way. The part played by those bodies is irreplaceable: they help to make Europe loved and to give Europe a soul, as some Members have so rightly said.

We have therefore all shown common sense in finding solutions that will enable us to put an end to uncertainty. I believe everything is now in place to close this file and I would like to point out that the Presidency has sent three letters to the chairman of the Committee on Culture, Youth, Education, the Media and Sport informing him that the Council is open to reaching an agreement at second reading on the basis of the common positions so amended.

The Commission’s position on the amendments contained in the various recommendations is as follows: so far as the proposal in the field of education and training is concerned, the Commission is able to agree to the three amendments voted by the Committee on Culture at second reading because they bring major improvements to the way the programme is implemented. So far as culture is concerned, the five amendments seeking to make the text compatible with the Financial Regulation and to take account of budget conciliation also meet with the Commission’s agreement. So far as youth is concerned, the proposed amendment introducing a transitional clause into the legal base in order to extend the period of eligibility to 1 January 2004 to take account of expenditure made during the period of legal vacuum also has the Commission’s agreement.

The Commission therefore fully approves Parliament’s amendments, Mr President. As you see, there is no more ambiguity and I will therefore end by thanking the rapporteurs, Mrs Iivari, Mrs Pack and Mrs Prets, for the quality of their work and above all for the spirit in which they undertook it. Thanks to you, ladies, we will be able to continue our very important work with European organisations that bring the Europe of citizenship to life.

IN THE CHAIR: MR PACHECO PEREIRA
Vice-President

Beazley (PPE-DE ). – (FR) Mr President, Commissioner, having listened to Commissioner Reding briefly, I am lost for words because it seems to me that this subject is very important. One may be a qualified teacher, but what can you do without resources, without money, especially at European level? The Council of Ministers occasionally shows greater generosity towards European projects,
but it is difficult for it to do so because, as we know, with subsidiarity education normally remains a national matter.

However that may be, if I am speaking on my own behalf and not as a Member of the European Parliament, if I am speaking as a former history teacher, I recognise that while money is indeed important for education there is something even more important. As Mrs Reding would say, education is also about training and the mind. Everyone here today, including those in the public gallery, was once a child and went to school and we can all remember good teachers. We forget the bad teachers and remember the good ones. What is a good teacher? It is someone who loves his subject, who also loves his pupils and also, of necessity, their families.

This report by rapporteurs Pack, Prets and Iivari is very important and I pay tribute to their work. It is not the end of the story, however. The end of the story would be that the generations that come after us should perhaps be able to achieve something that goes beyond what our regional and national systems can give. From our point of view as Members of Parliament, members of an EU institution, there is room for culture and education at European level. I hope that this report will be well received by the Council of Ministers and that teachers and pupils will thus be able to expand their minds a little. Culture and education are neither regional nor national nor European, they are all three at once.

Gröner (PSE ). – Mr President, should I now speak in English to further confuse the interpreters?

(Laughter)

(DE) Ladies and gentlemen, Commissioner, I would like to thank the three rapporteurs most warmly for having done a good job so quickly. I see it as giving cultural, educational and youth organisations the important message that this House has powerful advocates to plead their causes. If I may now speak on the area in which I have been heavily involved, with the White Paper on Youth, the new youth programme and the old one, I have to say that, as a result of their increasing contacts through the recent consultation processes, youth organisations and the European Youth Forum have had their expectations raised very high. I believe that young people are very satisfied with the good legal basis for financially supporting over 80 youth organisations.

Compared with other policy areas – cultural policy, say, or education – the youth programme is so poorly endowed that we end up allocating less than one per cent of the overall EU Budget to this area, and that, in the long term, ladies and gentlemen, is no longer acceptable. The public want to see the European Union reflecting their own interests. This is an area into which we must breathe life.
For this reason, the geographical dimension, which we must always have at the back of our minds when supporting youth organisations, is about more than the enlarged EU. It has to be clear to us that the European Youth Forum, as an umbrella organisation for youth, also works with the countries belonging to the Council of Europe, where it performs an important role as a political intermediary. Youth associations, let me say, are always a bit ahead of the other organisations. Young people think further ahead; they perhaps have a clearer view of their own future than do people like us who are immersed in day-today living and in the business of politics.

This explains the cooperation with the CIS, and the programme’s importance in terms of peaceful political development in the Mediterranean is not to be underestimated either. With regard to the elections on 10-13 June, too, I can only say that we have to persuade young people that Europe is the right place in which to take their political ideas further. Today, then, is a good day for us to adopt these three programmes, after which we can have a bit more clout in the Budget negotiations and, where forthcoming youth programmes are concerned, look further into the future.

Virrankoski (ELDR). – (FI) Mr President, the legal package before us aims at creating a legal basis for certain cultural, educational and youth action programmes. The purpose of these is to provide institutions and organisations in this area with financial support. The European Parliament’s budget has been used, in accordance with the A-30 lines, to support certain institutions, and NGOs that function on a voluntary basis in particular, which have promoted European activity and strengthened European identity. Over the years grants for organisations have become established to the extent that their allocation has been something that former recipients of aid have taken for granted. Selecting which organisations and institutions should receive financial support seems to have been a remarkably arbitrary process. New operators have said that inclusion has been very difficult, as the selection criteria have been vague. The choice seems to have been influenced more by the fact that the organisations selected have had strong advocates on the relevant parliamentary committees than by the quality of their operation being superior to that of others. This detail received attention when the Financial Regulation was being reviewed, with appropriations earmarked in the budget headings finally being cut or cancelled.

The legal package now under discussion will create a legal basis for grants to organisations active in the fields of education, culture and youth work. The aim must be for the forms of financial assistance from the European Union to be transparent and properly justified. This means that grants to organisations that are repeated and taken for granted should be few in number or they should not exist at all. Organisations and institutions have to demonstrate clearly that they are centres of excellence and better than others in the field. Funding must be based on applications assessed impartially and fairly. Financing has to be channelled in a way that clearly defines those targets the achievement of which the EU supports, and any recipient of aid must produce a credible report on the
use of funds. I wish to thank the rapporteurs, Ulpu Iivari, Doris Pack and Christa Prets for their excellent reports.

Perry (PPE-DE). – Mr President, I wish to begin by thanking all three rapporteurs for their reports, which I fully support.

In the ten years I have been in Parliament I have had responsibility either as the budget rapporteur or the shadow budget rapporteur for the Committee on Culture, Youth, Education, the Media and Sport, often working very closely with Mrs Iivari. I wish to concentrate mainly on the culture report. She and I are broadly in agreement on the principles. Perhaps we would differ to a certain extent in that I have always thought the parliamentary procedure for supporting activities is very open and transparent.

I also attended the conciliation meeting just before Christmas, when we hammered out the new legal base. I want to pay tribute both to the Commissioner and to the Commission staff for their support, as also to the chairman of the Committee on Budgets, who was extremely supportive.

Let me just make three key points. Spending on cultural activity is important. I totally agree with the Commissioner: Europe has to be, and is, about more than economics and trade. The activities of organisations such as the European Youth Orchestra, 'Swinging Europe', the European Forum for the Arts and Heritage – I could carry on – all help people to understand not just culture but also the cultural dimension of Europe and, through that, the European Union itself.

We all know that the Culture 2000 programme is grossly under-funded. It is also restricted by its own terms, and many organisations that need help at a European level and have been turning to Parliament will now be able to use this new legal base. We cannot expect the Member States to fund cultural activities of a European dimension – they will concentrate on the national dimension.

Culture funding is too small – that has been said before. Nearly 50% of our money goes on agriculture – I make it less than 0.5% on culture. But culture is an important wealth creator: 17% of UK GDP comes from the creative industries.

Finally, we have to ensure that organisations that receive funding support get the information in good time, so that money is spent efficiently as well as effectively.

Wyn (Verts/ALE). – Mr President, I am especially glad that these programmes will guarantee the financial stability of organisations such as Youth Forum, Jeunesse, the European Bureau for Lesser-Used Languages and Mercator information and documentation centres amongst many others.
Youth Forum and Jeunesse fulfil an important role in empowering and engaging young people in civil society, which is so important. They also provide young people with an environment to learn democratic decision-making, intercultural understanding and self-motivated learning. Likewise the European Bureau for Lesser-Used Languages and Mercator have both played, and will continue to play, an important role in safeguarding and promoting minority languages in the European Union. Their presence and work is especially needed now that 10 new countries will join the Union and further enhance the number of existing minority languages. There are 40 million minority-language speakers now. Six million other people speaking minority languages will join.

It is crucial that the speakers of these languages enjoy the same rights and possibilities that have been available to everyone else. I welcome also the measures to increase transparency in the decisions to allocate grants to organisations and also the user-friendliness of the grant application process which at the moment is far too cumbersome. Nevertheless I regret that in the case of youth NGOs the principle of degressivity remains in the common position, which will mean that the reduction of their funds from the third year onwards will make things rather difficult for them. Guaranteeing a regular budget for these NGOs would be the best way to support their activities and increase their effectiveness in future. I very much hope that these excellent reports will be endorsed by a substantial majority in Parliament.

Zabell (PPE-DE). – (ES) Mr President, Commissioner, ladies and gentlemen, rapporteurs, like the previous speakers, I believe it is essential to have a legal basis which provides us with a stable budget for European youth, culture and education programmes.

These programmes, which naturally the European Commission, Parliament and Council must be involved in, must have, firstly, the relevant legal basis, and that is moving in the right direction and, secondly, an adequate budget. And that is what we in the European institutions must do next in relation to European youth, education and culture.

I have often said in this House, and I will not tire of doing so, and today I am going to say it again, that the future of Europe lies in its youth. It cannot be any other way. And the future of Europe is going to depend very much on the education received by these young people. Although in accordance with the principle of subsidiarity education is not our responsibility, we can make a great and very positive contribution to the creation of a more united, knowledgeable, cohesive, cultured and educated Europe; this is what we all want. In the end this will benefit all Europeans.

I would therefore ask that, when we have finished the battle over the legal basis, amongst all of us we begin the battle to increase the budgets for youth, culture and education until they receive the sums they truly deserve, because that will benefit all of us.
President. Thank you very much, Mrs Zabell.

The debate is closed.

Voting will take place tomorrow at noon.

(The sitting was suspended at 4.50 p.m., until the Commission Communication, which was scheduled for 5 p.m.)

IN THE CHAIR: MR PACHECO PEREIRA
Vice-President

Education and training and Active citizenship

President. The next item is the Commission Communication on the new generation of Community education and training programmes 2007 – 2013 and on ‘Active Citizenship’.

Reding, Commission. (FR) Mr President, I promised that during the first half of 2004 I would outline the future prospects for the European programmes for which I am responsible. It is done. The Commission has just given the green light for the communication about these new programmes.

The two communications adopted today affect all Europeans, from their schooling to their lives as citizens. That is important because Europe is not only about economics, finance and commerce. Europe has a soul. Europe is men and women in their cultural diversity, which is our Union’s true wealth. The new programmes are trying to listen to them; they are designed to respond to their aspirations and help them to create a genuine European citizenship. Questions of education and citizenship will in fact be among the major issues of the coming decade. In a Union which is expected to have nearly 500 million people in 2007, strengthening the sense of cultural belonging and of being a citizen of a community of extraordinary diversity will necessarily require mobilising all the tools and programmes at our disposal. The programmes concerned by the communications adopted today will therefore form part of a new overall logic: building bridges between cultures and individuals.

Mr President, these programmes will be our future because their main thrust is to help young people to realise their European aspirations both in the field of education and in the vast field of citizenship. I know that these programmes come up to a lot of expectations. They have not been plucked out of thin air. There have been public consultations with thousands of professionals, with thousands of people involved in culture and education. We had the agreement
and the express request of Parliament to go ahead. I can also tell you in all honesty that the timetable will be tight because we will need 2006 to put these programmes in place and ensure a smooth transition between today’s programmes and tomorrow’s.

I would also like to tell you that the Commission has taken advantage of this to propose a major simplification. That simplification does of course have its limits because the legal bases, the customers, if I may put it that way, and the interventions are different. We have, however, managed to reduce the number of legal bases from 13 to six and the number of budget lines from 26 to seven. A revision of the Financial Regulation is also planned in 2005 and I very much hope that, in the interests of greater transparency, greater efficiency and less bureaucracy, we shall succeed in particular in making these programmes easier for the citizens to use.

All these programmes are European programmes which emphasise European added value and were therefore created and conceived at European level. However, their implementation will be decentralised to national agencies closer to the citizens. Those agencies will be responsible for the practical implementation of the programmes because they will be directly familiar with the citizens concerned. I can tell you that there is a tremendous capacity for absorption in this respect because even today our budget execution is virtually 100%. The applications we are receiving for projects connected with education and culture in the broad sense are at least 50% more than we are able to grant. We really have capacity to fill because there is a very large public demand to be satisfied.

Why did I wait until today to present these new programmes to you? Quite simply because I had to wait for the financial perspectives in order to be able to move forward. As I believe President Prodi said in this Chamber, the Commission thinks that education and citizenship are very strong aspects of future European policy. That is why the financial perspectives have offered us a greatly expanded budget. However, even if that budget is four times greater than what we have today, it is still far from being enough, ladies and gentlemen, because at the moment our programmes still account for only 0.8% of the Community budget. Even if the expenditure in question is appreciably increased in the interests of citizenship and in those of the men and women of whom Europe consists, it will still be only a very tiny percentage of the Union’s overall budget, not to mention the fact that, as I can tell you very clearly, there is still a lot of political work, a lot of persuading, to be done if we are to have that tiny percentage.

I said there were two programmes. The first is about education and is called ‘The New Generation of Community Education and Training Programmes’; its common theme is life-long learning, which must start at a very early age, teaching children how to learn, and must continue until citizens leave working life. There will therefore be just one integrated programme, a programme whose aim will be to ensure that languages, new technologies and, very importantly,
the dissemination of the results of our work, which are considered transversal elements, cover all aspects of education.

There will of course be different levels, as there are today: schooling, vocational education and training, higher education, adult education. European added value will be introduced at all these levels: mobility, of course, because it is up to us to stress mobility; partnerships between school classes, between organisations concerned with education; transnational projects, in which our educationalists will develop new programmes at the leading edge of progress. A few figures will illustrate what we propose. We want at least 10% of primary school pupils to benefit from real or virtual mobility projects: today’s figure is only 1.5% a year. We want a threefold increase in the number of Erasmus students: the present number is 120 000 students a year. We want the number of people benefiting from the Leonardo programme, which is concerned with vocational education and training, to rise from 45 000 a year today to at least 150 000. We want genuine mobility in adult education: the present figure is, I am almost ashamed to say, 2 000 people, and we would like to increase that to at least 50 000 people a year. I am speaking here of mobility within the European Union, because there is also, of course, the world outside the European Union. There are our new neighbours, whom we shall have to bring into our way of making Europe.

To this end, Mr President, we want to develop Tempus and make it into Tempus Plus, which will no longer concentrate solely on the university level, but will also provide aid tailored to the needs and capacities of each country, aid for all areas of education policy, including schooling and vocational education and training. Then there are our Jean Monnet Chairs. Today we have them in 50 countries. We think development at this level, too, is very important. Another aspect which will be of interest to the honourable Members who were speaking of finance only a few minutes ago, Mr President, is the integration of institutions like Bruges, Florence and Maastricht into our programmes so that the legal base is regulated once and for all. So much for the big new integrated Education programme.

Then there will be a second large integrated programme: ‘Making Citizenship Work’, which will combine several current programmes. These will continue as at present, under the umbrella of citizenship. It will cover three fields: youth, culture and media.

The first field is the Youth Programme. I know that some of you are more particularly interested in this programme, several aspects of which will be developed. The first aspect, the first strand, ‘Youth for Europe’, will combine mobility, participation and exchanges. Then the second major strand will be ‘European Voluntary Service’. By extending this service not only to individuals but also to groups, we would like to make voluntarism among youth a really strong and visible policy with the intention of extending it even beyond Europe. We want to make a kind of ‘Youth of the World’ programme, to contribute to the development of mutual understanding through an open-minded approach to
the world and active engagement of young people. I am thinking of the countries of the enlarged Europe, of strengthening cooperation with the candidate countries, with the Balkan countries and the EFTA countries, and also with other third countries. Another aspect which must not be neglected is the action of socio-educational instructors and support systems for training youth workers, and support for political cooperation.

The second field is culture. There will be three objectives with European added value here: professional mobility, the transnational circulation of works of art and intercultural dialogue. These will be the three common themes running through all our cultural actions. There will be no more rigid sectoral divisions like there are today, but rather the major emphases I have just described, with the three types of action we already know today: multiannual cooperation with private operators and businesses – an opening to the field of cultural businesses; innovative annual projects, no change there; and going back to the problems we have just solved, support for European cultural bodies. Here, too, ladies and gentlemen, there will be much simplification. There will be just one budget line instead of the five we have today.

The final field is the audiovisual sector. Here, too, there will be three major objectives: the preservation and enhancement of cultural diversity and heritage, the circulation of works inside and outside the Union, and strengthening the competitiveness of the industrial sector. You must understand that we are retaining the present scheme of things. Even today we say that investment in film production is a national, regional, private investment, or whatever you wish to call it, but not European. We are not changing that, but we are going to give the Member States the possibility of continuing that investment and continuing public aid for the cinema. To do so, we are going to intervene up and downstream. Upstream by acquiring competences. Our cinema schools must be networked. One might (why not?) imagine an Erasmus for cinema schools. That would be a very good thing. To have access to credits, it will be necessary to learn the specific work of filmmaking, including business plans. We do not want to educate oddballs, we want to educate people capable of making good films which, moreover, will sell.

Downstream there is the problem of distribution. You know that European films do not travel well, despite all our efforts. There is always the problem that people will go and see a national film in the country where it is made, but then the difficulties start when it crosses the border. We must therefore do all that we can to change the situation, not only to expand the market for films, but also for reasons of cultural diversity which I do not need to explain. We are going to strengthen the system of support and of selective automatic distribution and we are going to add support for dubbing and subtitling, support for multilingualism, so that it will not be too expensive for films to travel. I am thinking of new technologies in this connection, because 40% of the income from a film is already generated by DVDs. DVDs already have the potential to be multilingual. We will therefore have to work on that with a lot of commitment.
Then there is the question of greater promotion, in Europe of course, but also outside Europe. I am thinking, for example, of packages of European films translated into different languages, that would be shown at a festival in New York or New Delhi, accompanied by the European stars to really make the most of it and for high visibility.

In order to prepare for the future, ladies and gentlemen, we are reserving a space for ‘pilot projects’, a space of flexibility, because there are bound to be big developments in new technologies. We must therefore be ready to accompany those developments as required.

Ladies and gentlemen, that in a few words is what has been decided today. It is of course a framework. It is a structure, but I think that structure shows that the Commission is taking very seriously Europe’s most precious asset, Europe’s greatest wealth: the citizens and their cultural diversity.

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Pack (PPE-DE). – (DE) Mr President, Commissioner, I have three questions to put to you. Firstly, I would like to know if the extension of the Tempus programme to Tempus Plus is a response to the question raised in Thessaloniki as to whether the educational programmes were being extended to the countries of the Balkans. I would see that as not going far enough; I would like to see the whole of the Socrates programme extended, rather than just having Tempus as a new one.

Secondly, does the reduction of the Budget line not have the result that we, in this House and in the Committee on Culture, Youth, Education, the Media and Sport have even less of a say as regards who gets subsidies? What are the facts of the matter here?

Thirdly, are the programmes’ titles being lost? Are the names ‘Erasmus’, ‘Socrates’, and ‘Comenius’ no more, or are they being retained somewhere? It is not clear to me from the text. Although I hope I will get an answer to this, I regret that I will not be here to hear it, as I have to go to a briefing before another meeting. Please accept my apologies.

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Prets (PSE). – (DE) Mr President, Commissioner, let me start by thanking you for keeping to the timetable. It is good to see the new programme already up and running, and I would like to put three short questions to you. Since you want to increase and extend everything – Leonardo, for example, from 45 000 participants to 150 000, 10% primary schoolchildren rather than 1.5%, a leap from 2 000 to 50 000 in adult education, and more of the same besides – how much can we expect in the Budget? We used to get 0.8%; if we want improved performance and higher quality, that will have to be paid for somehow. Also, in what sort of stages is this objective to be achieved? How is it proposed to achieve it by 2012 or 2010, and who will then bear the additional expenditure if – as I am given to understand – many countries are no longer prepared to
contribute more than 1% to the European budget?

Rocard (PSE). – (FR) First of all, allow me to congratulate you, Commissioner Reding. In fact, in this period of gloom after the intergovernmental conference, this House does not often shake with enthusiasm. You have given us the opportunity to do so, which is a pleasure to hear. I have many questions, but I will put four of them to you. Three of them are concerned with what you have just said and one strays slightly from an issue that you dealt with, but it concerns our problems.

My first question is this: could you be a little more explicit about what you just quickly touched upon as regards quadrupling the budget? Over what period? On what basis? Is this about the whole budget for culture, youth and the media? What news! We are starting with such a small amount. All the same, we would like to know a little more.

My second question concerns languages. We know each other well, Commissioner Reding, and I admire the enthusiasm and the spirit with which you defend language initiation programmes and take on the defence of minority languages. In this context, it is the Council that is delaying. Will the Commissioner, in support of the programmes that she has just described, be prepared to go back to the idea that the Council must manage to put pressure on the Member States to make it compulsory to teach at least two modern languages? Furthermore, according to linguists, it would be preferable for one of these two languages to be outside of the linguistic family of the mother tongue. In this way, Europe would become multilingual and not dependent on our jargon that is similar to English.

My third question concerns the cinema. It was a pleasure to listen to you on this point, Commissioner Reding. On the issue of promoting cultural diversity and defending it in the area of cinema, however, you did not mention this unsuccessful text that was – it seems to me – drawn up by the Internal Market Directorate General. In the name of protecting competition, it claimed to harmonise, but in fact it is to remove or completely change all our structures for helping cinema and that worries us all. In our opinion, this reasoning was stupid, but we would like to hear it from your own lips.

My fourth question is a point of application. It concerns what you said on the issue of European high culture. You spoke about Bruges and Florence. I have just learnt that in Florence, following an international agreement fixing the budget of this institution, the notification sent to it was cut back by the Commission Secretary General by 20% compared with the sum agreed on and adopted by this Parliament, which is sovereign in Europe.
Gröner (PSE ). – (DE) Thank you, Mr President, and congratulations to the Commissioner, who has conceived the educational programmes along very ambitious lines. I hope that we, working together with the Commission, will be able to budget for them. I would remind you that Erasmus aimed to include 10% of students in the programme. Let us hope that we succeed in doing that.

Let me now turn to the new programme. Our agenda simply describes this as a debate on the education and cultural programmes. My fear is that young people will end up footing the bill if their concerns are thrown into a single package along with everything else. We, I think, must ensure – and you, in your proposal, must specify – that the youth programmes must be properly funded, that the informal system of education will continue to be valued as it needs to be in the future, and will be able to be extended in order to prepare people for active citizenship. If all these things – youth, culture, audiovisuals, media, and films – end up in a single package, my fear is that young people will end up paying the bill and losing out.

That must not be allowed to happen.

Reding, Commission . (FR) Mr President, I will try to be as brief as possible, mainly because I will be in the Committee on Culture, Youth, Education, the Media and Sport next Monday. As a result, it will be possible to ask all the questions that I can currently read in the faces of those around me then.

(DE) There seems to be a fear that the various elements in the Socrates programme will be done away with. I can tell Mrs Pack that the precise opposite is the case: the fact is that we will be extending the Tempus Plus programme to all types of schooling, that is to say, to schools, vocational training, adult education and universities. She asked whether the names are being abandoned, to which the answer is both in the affirmative and the negative. We now have an overall designation for the educational programmes, so that Socrates is no more, but Comenius, Erasmus, Leonardo and Grundtvig will remain for schools, universities, vocational training and adult education respectively.

Mrs Prets asked me about the position as regards the Budget. It is simple: when there is nothing left to be shared out, we will get nothing. The Commission takes a different view; what it would like is for something to be left to be shared out, and that is why it has no sympathy with those countries that want to pay just 1%. We need more if we are to be able to invest in the citoyenneté, in the citizens, in our young people, and the fact that the Commission’s budget for the future is an enlarged one means that it has made more funds available for education and for citizenship.

I have quite deliberately sought not to get involved in this debate, believing as I do that it is very important – including in political terms – to clarify what we want for
Europe, where we want to take it, and what we need in order to achieve that end. Only when we have done that should we look to see how much money we need in order to make that a reality. Tackling this from the other end is the wrong way to go about it.

(FR) I wanted to say to Mr Rocard that quadrupling the budget is in line with the Financial Perspective that the Commission has presented. You will, therefore, experience a lot more pleasure, Mr Rocard, in negotiating and battling with the Council, which will surely want to grant less than the Commission proposes. It will then be necessary to clarify the area where reductions will be made. Do we want 120 000 or 360 000 Erasmus students every year? We need to be very clear. If we do not give ourselves the money to finance the 360 000 Erasmus students or the 10% of schools that could benefit from an education mobility programme, then we cannot do it. That is clear.

Languages, Mr President, are included, as a common theme, in all our education programmes as well as in our programmes for citizenship. Clearly, Europe cannot be built without linguistic diversity. Despite everything, I am pleased to mention the modest progress achieved in our Member States and I will never fail to take the opportunity to speak to them to persuade them to forge ahead.

As regards cinema and aid for it, I thought that I said, Mr President, that we have to be logical. If, in the name of the European Union, we do not want to invest in the production of films, then we must give Member States the possibility of doing so.

You will have to wait until next week, Mr Rocard, when, in your capacity as Chairman of the Committee on Culture, Youth, Education, the Media and Sport, you will hear an answer that will satisfy you and I am sure not just you, but all European film-makers and all those who love the cinema.

Mrs Gröner gave voice to the fear that it would be detrimental to young people if youth, culture and media were to be lumped together in one package. I can tell her that she can rely on me not to allow that. When we present the actual programmes in July, you will see that young people will not have been forgotten. We always say that they are the future of this Europe of ours, and that is indeed the case. The only thing is our deeds have to back up what we say.

President. – The debate is closed.
President. We shall now proceed to Question Time (B5-0066/2004).

We shall take a series of questions to the Commission.

Part I

Question No 27 by Neil MacCormick (H-0067/04):

Subject: Potential abuse of dominant position

Is the Commission aware that there is profound concern in Scotland concerning perceived abuses by the Norwegian state of a dominant position in the fish-farming industry? Will the Commission, in this light, indicate what steps it is taking and has taken to prevent abuse by Norwegian state-controlled and other interests and by the Nutreco Group of the Netherlands (the management policies of whose aquacultural interests are believed to be determined in Stavanger), particularly in respect of feeding materials?

Fischler, Commission. (DE) Mr President, ladies and gentlemen, I will give a very direct answer to that question. The Commission is prepared to conduct an in-depth investigation of the alleged abuse of a dominant position in the European Union’s fish production as and when evidence of such abuse is produced. As long ago as 1992, we ruled to prohibit a price cartel operated by Norwegian, Scottish and Irish salmon breeders. We are liaising on a regular basis with the Norwegian authorities as regards observation of the markets referred to in the question. As I have said, I am prepared to examine the available information in depth and, if need be, to set in motion other investigations into this matter.

MacCormick (Verts/ALE). – I warmly thank Commissioner Fischler for that very direct answer. It is extremely important that this allegation of abuse of dominant position should be investigated.

A particular concern is that the breeders of juvenile fish, or smolt, are mainly based in Scotland and Ireland and are dependent entirely on sales to the ongrowers who are in turn affected by the feed manufacturers. The feed manufacturers and the ongrowing concerns are heavily dominated by Norwegian interests and that is where the abuse of dominant position within the market arises. One particular risk that it gives rise to is that a particular asset currently in the hands of EU-owned salmon breeders is the genetic data and genotyped brood stock, which is of fundamental importance, as I am sure the
Commissioner well realises. In conducting his further investigation, with which I will be very happy to cooperate as much as I can, will he take a particularly close and concerned look at that aspect of the situation?

Fischler, Commission. (DE) Mr President, I can only ask the honourable Member to forward to us whatever information he receives, as we are willing to give all these issues the attention they deserve. Apart from that, I cannot do other than agree with what you have said.

Purvis (PPE-DE). – Commissioner, I join Mr MacCormick in thanking you for your direct answer. He and I have been passing information week after week to you and your colleagues but have found there to be a rather roundabout relationship between you for aquaculture, Mr Monti for competition policy and Mr Lamy for trade, which makes life very difficult. Can I ask the three of you to join forces and work in a joined-up way, in order to prosecute this particular problem with the utmost urgency? The life is being squeezed out of our constituents in Scotland.

(Applause)

Fischler, Commission. (DE) Mr President, ladies and gentlemen, I would like to clarify something here. There is indeed a difference between agriculture and fisheries in this respect. The fact is that I am also responsible for the international side of agricultural matters. As well as that, I am authorised to conduct negotiations relating to the agriculture sector, in the WTO for example. There is a different situation in fisheries, where my fellow-Commissioner Mr Lamy has responsibility for the international dimension.

I am quite happy, though, to take up your suggestion and, the next time we have one of our bilateral and trilateral meetings – as I can assure you we do – we will certainly see to it that the information will be made available at an appropriately early stage to all those who may have some responsibility for this.

President. As the author is not present, Question No 28 lapses.

Question No 29 by Bill Newton Dunn (H-0090/04):

Subject: A level playing-field for suspects who are accused across the Union

For the EU Arrest Warrant, and the proposed EU Evidence Warrant, to work successfully, there must be a level playing-field in respect of rights of suspects
across the Union.

When will the Commission make a formal proposal for an EU-wide agreement on safeguards for procedures which involve suspects? In other words, to propose equal access to lawyers and interpreters, to combat police immunity, and to ensure similar interpretations on how human rights are interpreted including the right to liberty, the right to a fair trial and the right to silence?

Vitorino, Commission. Very shortly the Commission is planning to present a proposal for a framework decision on certain procedural rights for suspected persons in criminal proceedings throughout the Union. The draft instrument is in its final stages of internal consultation within the Commission. When it is finished and has been translated, it will be sent to Parliament and the Council. The draft framework decision covers five basic rights: access to legal advice; access to free interpretation and translation, ensuring that persons who are not able to understand or follow the proceedings receive specific attention; the right of foreign detained persons to communicate with their consular authorities; and written notification of their rights.

As regards the right to silence, the Commission has asked the Law Society of England and Wales to carry out a study on gathering and handling of evidence, including how the right to silence is interpreted in all the Member States and in the acceding countries. Once the report of this study has been received, the Commission will evaluate the need for any proposal in this area.

Police immunity is not within the competence of the European Union, since the maintenance of law and order and the safeguarding of internal security are explicitly excluded from the ambit of the Treaty on European Union.

Newton Dunn (ELDR). – Thank you for the reply, Commissioner, which sounds encouraging. I am aware of what a terrible minefield this proposal is going to be. Take the example of the arrest warrant, which all the Member States have ratified but only eight have transposed into national law. It is going to be very difficult to get this proposal through, but you have the backing of our committee.

Two big obstacles lie ahead of you. There is a problem of mutual recognition versus standardisation. Standardisation would be better, but mutual recognition is the easier approach. How are you going to achieve that and ensure it works when there is the European Convention on Human Rights, and every smart lawyer will immediately say that he does not recognise somebody else's ability to pass judgement and is going to appeal to Strasbourg? How are you going to make this work in practice? It is going to be very difficult and I look forward to receiving some reassurance from you.
Vitorino, Commission. I confirm that it is extremely difficult, because almost half the Member States do not agree that there is a legal basis to deal with these issues at European Union level. That is not the position of the Commission.

We think that mutual recognition, which is the cornerstone of judicial penal cooperation, requires mutual confidence among Member States. To a certain extent, to create that climate of mutual confidence, we need a minimum degree of harmonisation or at least approximation of penal law, including procedural guarantees.

We are not working in an empty field; the European Convention on Human Rights lays down some standards. We think that we should go further at European level and be more specific about how to use the procedural guarantees already laid down in the European Convention on Human Rights. We will present our proposal fairly soon and we will try to get it through the Council. It will not be easy, but I am determined to follow that path.

MacCormick (Verts/ALE). – Commissioner, you will forgive me for finding the situation unsatisfactory, as I am sure you do too. We were assured, at the time the European arrest warrant was introduced, that effective common minimum standards would follow hot on its heels. We now discover that they are not going to. Those of us who suggested building a European habeas corpus into the arrest warrant find ourselves reinforced in our belief that this would have been wise. Can you concede, Commissioner, as one who has been a doughty fighter in this regard that, if the new Constitution were to come into force, the Member States would in future find themselves subject to the Charter of Fundamental Rights of the European Union when executing European arrest warrants, and that this would be binding law because in implementing European arrest warrants they would be implementing European law?

Vitorino, Commission. Mr MacCormick, I share your view that the situation is unsatisfactory but, nevertheless, there is no empty field, as I said. Firstly, there is the European Convention on Human Rights, which deals with fair trial rules, and which has been subscribed to by all Member States and all acceding states. Secondly, there are some specific procedural rules in the framework decision on the European arrest warrant as such and, thirdly, I am fully supportive of the idea of the Charter of Fundamental Rights being legally binding, with constitutional status. As soon as we resolve the minor matters of the weighting of votes, it will come into force, I am sure.

President. As the author is not present, Question No 30 lapses.

Part II.

Questions to Commissioner Fischler
Question No 31 by Camilo Nogueira Román (H-0069/04):

Subject: Galician fisheries and the European Fisheries Control Agency

What position will the Commission adopt with regard to the concerns, expressed by the Galician fisheries sector to Commissioner Fischler during his working visit to Vigo, that it would be appropriate for the Agency to take on duties relating to research and the improvement of the scientific principles governing the state of fishery resources and to consider the possible introduction of a system for the exchange of fishing quotas between Community enterprises? According to the Galician proposal, this would make its responsibilities similar to those of other agencies, such as the ones dealing with the internal market or the promotion of social dialogue.

Fischler, Commission. (DE) Mr President, ladies and gentlemen, on 13 December 2003, the European Council gave the go-ahead for the establishment of a Community Fisheries Control Agency, on which, at the end of this month, the Commission will submit a proposal in which we will define this new authority’s tasks. The most important of these will be the coordination of the joint deployment of the control services in the Member States. The checks are to be carried out by, among others, multinational teams, with the inspection strategies to be used, such as benchmarking and common priorities, laid down by the Commission. We will also be involving experts from the Member States in the setting-up of the agency and consulting the various interest groups. We expect a study to be produced in September on the operational aspects of this agency, and its results will be discussed by the Council when making its decision. On the occasion of my most recent visit to Vigo, the Galician fisheries sector suggested potential sites for this agency; I will of course examine these suggestions in detail, and they will also be considered in the studies to which I have referred. Provided that the Council accepts our proposal, it will then be possible to appoint the board of management and the executive director, and then this enterprise will be, in a sense, up and running.

Nogueira Román (Verts/ALE). – (PT) Commissioner, I was aware, as you would expect, of your visit to Vigo, my birthplace, and I know that the city’s fishing sector, one of the largest in Galicia, in the Spanish State and in Europe, has just issued a set of suggestions concerning the duties and competences of this Agency, which I believe deserve a concrete answer from you. Furthermore, I believe that you should promote an open dialogue with the sector before defining the Agency’s regulations and I believe that this institution could provide the much-needed link between those working in the industry and the scientific institutions. In any event, I wish to ask you expressly whether the Commission has already received the proposal from the Spanish State to ensure that the Agency’s headquarters are established in Vigo and when you think it
will be definitively established there.

Fischler, Commission . (DE) Mr President, we have not yet had the official proposal for this Agency’s actual base, but, as I have already observed, there is still enough time for this, as we first have to establish its legal base. Although we will be making a proposal for this without delay, this proposal must then make its way through the legislative process.

Varela Suanzes-Carpegna (PPE-DE ). – (ES) Mr President, my question is a specific one: as has been said, it is clear that it was the Council that decided that this agency should be created in Spain, that this decision was approved and that the democratically-elected Spanish Prime Minister, Mr Aznar, accepted that it had to be located in the city of Vigo. I believe that the Commission has also accepted this, since the Commissioner has been there himself. I therefore believe there is no doubt about this.

What naturally worries the sector now is when this agency will begin to operate. I believe that Parliament will have to give its opinion on the Commission’s proposal and that, once the new Parliament is constituted in July – and this is what I want to ask the Commissioner – I believe that in September – as he has said – it may be in the operational stage.

If in the Autumn – September or October – Parliament gives its opinion and it is in favour, does that mean that in 2005 the agency could be operational or that all the procedures for putting it into operation could be finished, if all the procedures can be carried out on the basis of the new membership of Parliament?

Fischler, Commission . (DE) Mr President, in order to avoid any misunderstanding, I would like to make it clear that the Agency cannot start its work before the legal basis for it is established. I have pointed out that the Commission – which is acting very quickly here – will this month submit the proposal for the legal basis, after which both the Fisheries Council and Parliament will have to state their positions and take a decision.

As things stand at present, we can expect an opinion from Parliament only after the Parliamentary elections, which means that the Council, too, will be able to come to a decision no earlier than towards the end of this year. Only after this decision has been taken will it be possible to start the recruitment procedures and look for staff, which process will take up a certain amount of time next year. I regret the fact that it is neither legally nor technically possible to do this more quickly. Nor will we be able to draw on any funds until such time as the legal basis is in force.
President.

Question No 32 by Paulo Casaca (H-0072/04):

Subject: Emergency measures to stop the pillaging of resources in the waters round the Azores

In anticipation of the liberalisation of access to the waters of the Azores, which was to come into force on 1 August 2004, dozens of Community vessels not registered in the Azores have entered these waters, alleging that they have been authorised to do so by third Member States.

The Portuguese authorities have proved incapable of checking the fishing techniques used and the quantities and species of fish being caught by these vessels, and the Azores’ regional authorities fear that the pillaging of resources they foresaw as a consequence of the entry into force of the provisions of Regulation (EC) 1954/2003 has already begun, ahead of schedule.

When does the Commission intend to use the powers conferred upon it by the Treaty and meet its obligations to defend that Treaty, and take the requisite emergency measures to put an immediate stop to this fishing activity?

When does the Commission intend to review its position of acceptance the Council’s position, given the growing evidence that the Regulation violates basic principles of the rights of peoples and of the environment, enshrined in the Treaty?

Fischler, Commission . (DE) Mr President, ladies and gentlemen, although the Commission is of course aware of the presence of Spanish fishing vessels in the waters off the Azores, there does appear to be a certain misunderstanding here on the part of the Portuguese authorities as regards the applicability of Regulation 1954/2003. Article 5 of this Regulation, which governs the conditions under which fish may be caught in the waters around the Azores, Madeira and the Canary Islands, states that the Member States can reserve to local vessels the catching of fish within 110 miles of the coast. That has been the case ever since 14 November 2003, when this legal provision entered into force. It is for the Member States to ensure that these regulations are complied with. It follows that the presence of Spanish vessels in the waters around the Azores outside the 100 nautical-mile limit does not justify any emergency measures of the kind suggested by Mr Casaca, as these ships are complying with the rules on access.

I would remind you, in this context, of the Commission’s statement on the occasion of Regulation 1954/2003’s adoption by the Council, when we also announced a ban on trawling off the Azores, with the intention of preventing damage to the vulnerable ecosystems on the sea bed. On 3 February this year, we submitted to the Council a proposal for a regulation on this subject. The
Commission is also engaged in an ongoing dialogue with the Member States concerned with the intention of ensuring that any friction in the implementation of the new rules is minimised as far as possible.

Casaca (PSE). — (PT) Mr President, I am sure this is an oversight, Commissioner, but you did not refer to Article 15 of this Regulation, which is very specific as regards revoking the system that currently preserves Azorean waters. The date referred to is 1 August or, alternatively, the date of the entry into force of the set of implementing regulations on the fishing effort, which has not yet entered into force.

This article cannot be revoked on anyone’s whim. The Council, the only legal authority to have delivered an opinion on the matter to date, as stated in the Minutes of the Council meeting of 19 February, has stated unequivocally that this date must be respected. I wish to ask you, Commissioner, by what right do you think you can revoke an article for which no other interpretation is possible and which protects the territorial waters of the Azores until 31 July?

Fischler, Commission. (DE) Mr President, for a start, I can assure Mr Casaca that we have consulted our legal services, whose view of these things is precisely that which I have put to you, and no other.

What we have decided, in principle, is that, on the one hand, a new boundary of 100 nautical miles has been laid down, whilst, on the other, the fisheries protection zone has been extended to cover more species of fish, instead of protecting only tuna fishing as was formerly the de facto case. So, even if you rely on Article 15, I cannot help you. The Spanish action in the case to which you refer was quite proper.

President.

Question No 33 by María Izquierdo Rojo (H-0091/04):

Subject: Recognition of Spanish productive circumstances in the future COM in olive oil

The 1998 reform of the COM in the olive sector established a transition period for the provision of reliable data on the olive oil sector, in the wake of the complaints made by Spain regarding the failure to adjust its national quota. Since then, the data made available and the evolution of the existing COM have confirmed its inadequacy and its discriminatory impact by comparison with the productive circumstances of other Member States. The olive growers of Spain, and especially Andalusia, receive less aid on average than all others, with an average penalisation of 33% over the entire period.
This unfair state of affairs needs to be corrected for the future. The new COM in olive oil offers the Commission the opportunity to bring the national quota for Spain into line with the real productive circumstances of its olive sector, thus averting the consolidation of a discriminatory situation which would lead to major losses in budget terms for the oil-growing regions and areas for whose economy the sector is vital.

Will the Commission undertake the necessary review and bring the financial arrangements for Spain into line with the real productive circumstances?

Fischler, Commission. (DE) Mr President, let me point out, by way of introduction, that we will be discussing the issues raised in the last questions in the course of this evening’s debate on the reform of the olive oil, tobacco, cotton and hops sectors.

Turning to the question itself, the general principle underlying last June’s reform of the common agricultural policy was that the funds per country would have to relate to the average aid granted in the course of the reference period. There is no reason why olive oil should be treated any differently. The Council of Ministers has already decided to deal with it in parallel to the June reform. Reviewing the national quotas at the present time would also be contrary to the thinking that prompted us to introduce them in 1998 and it therefore follows that the Member States are responsible for keeping increases in production under control. At that time, the national quotas were fixed at a level that subsequent studies have confirmed as corresponding to the sector’s structural dimension in the individual producer Member States at the time. As you are no doubt aware, Spain has a 43% share of the overall maximum, between its share of the number of olive trees cultivated – 39% – and its share in the area under olive groves, which was 44% in 1998. Looked at from that angle, what we are debating is very definitely a fair offer.

Izquierdo Rojo (PSE). – (ES) Mr President, Commissioner, you know that the basis used for this reform contains out-of-date quotas with regard to Spain. You know that, in this regard, Spain is a specific case and that the studies carried out and all the surveys demonstrate that in reality Spanish production is greater than has traditionally been recognised.

Spain has been penalised in terms of its production quotas, and this is clear. This situation must therefore be recognised because Spain is not the only Member State in it.

Bearing in mind that, in reality, the new reform of the CAP represents a settlement of the previous stage – and when it is settled, it is done in accordance with the calculation of the ‘real realities’, and not the out-of-date realities – and bearing in mind that throughout this stage we are now settling, Spain has been penalised in comparative terms – and this can clearly be demonstrated – with a
disparity with its real production and, Commissioner, reminding you also that
the Spanish olive growers received you always in the great hope that you would
appreciate their reality and potential in terms of health and environmental
defence, I would ask you: will you not consider the possibility of our real
production being reflected in the national budget? We call for transparency and
an adjusted quota.

Fischler, Commission. (DE) Mr President, I have to be quite frank in saying
that I do not share Mrs Izquierdo Rojo’s view that Spain has been penalised, as
there was a reform in 1998, in which absolute upper limits were agreed on,
including by Spain. It cannot therefore be said after the event that Spain was
penalised.

Further to that, Mrs Izquierdo Rojo, I also have to tell you that what you seek
will ultimately add up to over a hundred million euros, no more and no less,
being spent additionally on support for the Spanish sector to the exclusion of all
others. The problem here is that I cannot, at one and the same time, do as I am
required to do and keep this neutral in its effects on the budget while also
acceding to your demand and getting another hundred million euros from
somewhere. The fact is that they simply are not there.

Patakis (GUE/NGL). – (EL) Mr President, the 1998 review created serious
problems in both Spain and Greece, especially with the 419 000 tonne quota,
when it was a known fact, on the basis of the data from the directorates of
agriculture, that production in Greece totalled 600 000 tonnes and more. The
quota of 419 000 tonnes created serious problems for small olive producers. As
the Ministry of Agriculture, in an effort to manage this issue, reduced
production, we had these results; as you know, we had continual demonstrations
in Greece because this tiny quota did olive producers an injustice.

So as far as the demand by my honourable friend from Spain is concerned, I
think that the injustice is the same in Greece. That is why, Commissioner, these
quotas need to be changed.

Fischler, Commission. (DE) I regret, Mr Patakis, that I have to correct you on
this. This is very far from being the same situation as in Spain, nor is it very
astute of you, as a Greek MEP, to argue along these lines, as, in 1998, when
these things were laid down, Greece’s national guaranteed quota was – as you
quite rightly said – 419.5 thousand tonnes, corresponding to 23.6% of the total
for the EU. If you compare that with the number of trees that you have, which
make up only 20% of the overall total, and with the surface in hectares, which
amounts to only 18.8% of that in the EU, there would actually be justification
for transferring part of your guaranteed amount to Spain, rather than in the
direction in which you have called for it to go.
President. Tonight, as the Commissioner has pointed out and as you know, there is an important debate on agriculture and you will have the opportunity to exchange points of view.

As the author is not present, Question No 34 lapses.

Question No 35 by Carlos Lage (H-0121/04):

Subject: Use of specific traditional wine appellations by third countries

On 23 February 2004, the Commission adopted a package of amendments to Regulation (EC) 753/2002 which is allowing the use of specific traditional appellations by third countries. These include tawny, ruby, vintage and late bottled which are exclusive to port wine, and others traditionally used for Madeira wine and various regional varieties produced in Portugal. The amendments adopted by the Commission will most definitely have a negative impact on the production and marketing of all the wines in question, but the effects will be particularly bad in the case of port wine, both because of what it means to the economy of a huge part of the country the Douro region, where there are 33,000 wine-growers and, because of its significance in terms of revenue: it accounts for over two-thirds of wine exports, and some one-fifth of agro-food production. Furthermore, the trivialisation of appellations referring only to port wine, its standing and quality, could actually damage the wine’s very image at international level.

Given that the Commission has perpetrated this error, does it not think it should now make good the harm it has done, and rescind its decision? What guarantees can the Commission offer that the world image of port wine will not be affected, specifically in terms of its genuineness, reputation and the ease with which it can be identified by the consumer?

Fischler, Commission. (DE) Mr President, ladies and gentlemen, you are probably familiar with the traditional English appellations ‘ruby’, ‘vintage’, ‘tawny’ and ‘late bottled’, which, at Community level, are protected terms when applied to fortified quality wines produced in Portugal. To put it another way, these traditional appellations may be freely used with reference to other quality wines.

In order, though, to be allowed to use these appellations, which are traditional in Portugal, a third country must comply with certain requirements and meet the following conditions:

Firstly, the appellation must be specific, in other words, it must be recognised as a label of quality.
Secondly, the appellation must be characteristic or enjoy a certain reputation, that is to say, the average consumer must be able to recognise it as distinguishing between one wine and another.

Thirdly, the appellation must be traditionally used within the territory of the third country in question.

Fourthly, the rules laid down by the third country must not mislead the European consumer in the event of the wine from the third country appearing on a market within the European Community.

The fifth condition is that the official language of the third country must be English, which it is in the case of South Africa, Australia and the USA. Where English is not the official language of the country in question, its use must be provided for in legislation and English must have been used for this traditional appellation for at least 25 years without interruption. As English is not the official language in such third countries as Argentina, Chile or Brazil, and the laws of these countries contain no such provision, these countries cannot use the traditional appellations on the EC market.

In order to be allowed to use a traditional appellation in the EC, a third country must submit a dossier to the Commission, which will permit its use only if the various conditions I have enumerated are complied with. Consultation of the Member States is guaranteed by the involvement of the Management Committee in this procedure.

Amending the Labelling Regulation will have no adverse effects on trade, as the traditional appellations for fortified wines are limited, whereas third countries generally export ordinary or unfortified wines.

Lage (PSE). – (PT) Commissioner, thank you for your explanations. You appear to believe, Commissioner, that designations of prestige are not simply arbitrary labels placed on bottles, but appellations of prestige matured by art, science and weather. You have just said, however, that these appellations can now be used by third countries provided that they fulfil a raft of criteria, a set of requirements that you have just listed for us.

You even appear to believe that these requirements will protect us from adulteration, counterfeit and fraud. I, however, do not believe this, Commissioner! This will open the floodgates for serious damage in future to a very large demarcated region, the first in the world, the Port Wines region, which alone accounts for one-fifth of Portugal’s agricultural exports. I am sorry that I cannot agree with you, Commissioner, but I am not sure that the requirements and guarantees that you have given us by means of this regulation will really protect the quality of these traditional appellations.
Mr President, if I may again clarify this point, I fully agree with Mr Lage that these appellations are indicators of prestige and are of corresponding economic value in the marketing of these wines. That much is abundantly clear. On the other hand, though, we have to comply with certain rules; if we do not, we run the risk of being taken to the WTO and, if we lose the case, then this system of protection is in ruins. I do believe that the rules we have put in place are in any event sufficient to guarantee adequate protection.

The risk of misuse or of counterfeits, to which you referred, is another issue. The new provisions do nothing to alter the risk of counterfeiting; it is always there, as the use of these prestigious names is always an attractive option. In order to address this risk, we have to ensure that appropriate controls are in place, and also that names such as these are not used by those not entitled to them, as happened frequently in the past. The main thing here is that cooperation with the import authorities should run smoothly, as these imports cannot just find their way across the border, but have to be declared.

Fischler, Commission . (DE) Mr President, Mr Howitt, ladies and gentlemen, in the Commission Communication of 29 September last year, we put forward three possible options, one of which is based on a quota system. As a thorough impact analysis has shown that implementing the ‘Everything But Arms’ agreement with the help of an ordered system of rights to supply the market would have a similar effect to what is being done already, we decided instead to consider the ‘fixed quotas’ option as a variant of the status quo, so all the options continue to be open to discussion.

I would also remind you, though, that the ‘Everything But Arms’ initiative is the part of the EC’s general preference system that envisages the complete liberalisation of sugar imports from the least developed countries by 2009. Until then, the sugar trade would normally continue on the same basis as trade in other agricultural produce. The least developed countries’ reference to flexibility in terms of quantity and negotiated quantitative restrictions could raise questions about compatibility with WTO rules if they were to be seen as a sort of voluntary limitation of exports. As you will be able to gather from what I...
have said, we really will not, in our deliberations, lose sight of the situation of the least developed countries, and will be taking it very seriously.

On 3 March, representatives and ministers from the least developed countries presented a new initiative in relation to our rules on the duty-free preferential access of their sugar to the Community market, and I discussed it with them. We will examine this proposal with great care, as we do all contributions to our preparations for the reform of the common market organisation for sugar. The initiative aims, over an extended period, to broaden the access that is at present limited. As we work on these proposals in preparation for their presentation this summer, we will take due account of all contributions received.

Howitt (PSE). – I am grateful for that answer, Commissioner. In particular, I am glad that you have been listening to the representations of the least-developed countries and that all options remain on the table.

I should like you to comment more specifically on their argument that the fall in price that is integral to two of the Commission's three options would 'make the EBA initiative meaningless for sugar. The Commission seems to prefer maintaining free access for the LDCs into a market with a price that is too low for them to compete, over that of negotiating with the LDCs an orderly market that achieves a price that allows them to compete and create development'. Commissioner, do you not see a parallel with that in the arguments from sugar beet growers in Europe, not least in the UK, who also call for an orderly market with, as they say, European price levels that would allow both domestic and developing country industries to invest for a sustainable future?

Given that the arguments are coming from both developing countries and developed countries within Europe, surely a higher sustained price with a managed reduction is the better course of action. Could you comment on that specific point, Commissioner?

Fischler, Commission. (DE) Mr Howitt, you are, in theory, right to say that higher prices in Europe help to make exporting to Europe a more attractive prospect for poorer states. You must surely also be aware, though, that there are numerous reasons why the current price level is quite simply unsustainable. We really should not be deluding ourselves where our own sugar beet farmers or the developing world’s exporters are concerned. The current price on our internal market is something like three times higher than that on the international market and, whatever happens, we will, in the current WTO round, be obliged to reduce our external protection for sugar. That alone will be enough to bring the price down on the internal market; there is no other way of doing it. That is the problem facing us.

To that we have to add other issues, such as how we can compensate for additional imports from the least developed countries merely by cutting back
our own production, for sugar consumption in Europe is not going to increase. Nor must it be forgotten that sugar faces ever-tougher direct competition from other sweetening agents. No longer is there any sugar in Coca-Cola today – it contains isoglucose and nothing else. These sweeteners are also in direct competition with sugar. If, as the USA did a long time ago, we create a free market for them, quantities will increase accordingly. The result of all that is that, in the European Union, production will not decrease in the same way in every Member State; on the contrary, the simple fact of the matter will be that, in some of them, sugar production will quite simply no longer pay and so they will stop growing sugar beet. That is what we have to reckon with. I do not think it makes sense to arouse expectations that we can never satisfy.

There is also the problem of having to consider how we help those developing countries that have traditionally been our sugar suppliers – Mauritius is one example – if they begin to see exporting sugar to Europe as a less attractive prospect than it was in the past.

Schierhuber (PPE-DE). – (DE) Mr President, Commissioner, the poorest countries in the world – or so the media tell us – have asked to be allocated their own sugar import quotas. Will the Commission be prepared to include considerations such as these in the legislative proposals that it is due to present in the summer? Secondly, when, in the course of this summer, can the Members of this House expect to see the actual Commission proposals?

Fischler, Commission. Mr President, Mrs Schierhuber asked when the proposals may be expected. We have said all along that we intend to present them before the summer and that is still our intention. The only thing that could create problems is something I have not previously mentioned, namely that the EU is facing a panel in Geneva over the so-called C-quotas issue, and we need to know what can be expected from it. It follows that another factor we have to take into account is the timetable of the authorities in Geneva.

Turning to Mrs Schierhuber’s other question, Europe is of course an attractive market and it follows that many states would be happy to export to it, but our view is that we need to have clear priorities in this area, and what these boil down to is that only the least developed states should have free access to the European market. As you will be aware, we have also devised special rules for the Balkan states. The ACP states are to have limited priority access with a clear preferential tariff, as will the other countries in so far as we have treaties with them. If we were to allow everyone to export sugar to Europe, we would not need an organised sugar market, but its wholesale liberalisation, which would, however, mean that at least two-thirds of European sugar production would have to be abandoned.
President. As the time allotted to questions to Commissioner Fischler has elapsed, Questions Nos 37 and 38 will be replied to in writing (3).

Questions to Commissioner Wallström

Question No 39 by Marie Anne Isler Béguin (H-0065/04):

Subject: Human and financial costs of pollution in the enlarged EU

A WHO study published in September 2000 established that, in France alone, atmospheric pollution is the cause each year of 31 700 deaths, 500 000 asthma attacks and 25 000 cases of bronchitis, and has an economic impact equal to 1.7% of GDP.

Has the increasing threat posed to living conditions by pollution in an EU of 27 Member States, in terms of health and life expectancy, spurred the Commission to have an epidemiological study conducted to quantify in full the mortal impact (diseases and longevity) of the different types of pollution and their economic costs, notably in combination with the effects of global warming?

Do such vital threats to societies in an enlarged EU not make it an utmost and priority duty to conduct epidemiological research, disseminate the results of this on a scale commensurate with the issues at stake, raise awareness with regard to these issues and incorporate them as a background theme in all Community policies?

Wallström, Commission. I would like to thank Mrs Isler Béguin for this question on a very important subject. The link between human health and the quality of our environment is indeed a top priority and we need to understand this link better in order to assess the effectiveness of existing policies and ensure that we address the problem adequately.

In a global sense the links between environment and health are addressed in the communication on a European environmental and health strategy adopted by the Commission last year. In this communication we announced the establishment of a European environment and health monitoring and response system to link information on health effects, exposure to environmental contamination and the emissions responsible for contamination.

Different parts of Europe are facing different problems. The environment and health strategy is therefore being developed for an enlarged Union, fully involving the new Member States from the outset. The Commission will now work on presenting an action plan setting out the programme for a first phase, focusing on selected priority diseases and pollutants at the Ministerial
Conference on Environment and Health in Budapest on 23-25 June.

We are also following the epidemiological work being carried out in the scientific community, and in particular working with the World Health Organisation and other experts to understand the results of research and promote further action. For example, under the quality of life and management of living resources programme, which is part of the Fifth Framework Programme for Research, a specific key action on environment and health provided support for 16 multidisciplinary multinational research projects devoted to air pollution.

Such studies foster the development of protective measures and feed into the process of regulating pollutant emissions by revealing the causal links between pollutants and health effects and providing tools for measuring exposure and effects. The Commission's Joint Research Centre is also contributing to increasing our understanding of the link between environment and health in various ways.

As far as air pollution is concerned, the framework for doing this will be the thematic strategy on air pollution, due to be adopted next year, which is currently in preparation through the Commission's Clean Air for Europe programme – 'CAFE'. This programme includes a very broad survey on the health effects of air pollution, the expected evolution of air quality between now and 2020, the effectiveness of existing policy and the potential for taking further cost-effective measures to reduce emissions.

Isler Béguin (Verts/ALE). – (FR) I wanted to thank Commissioner Wallström for her reply. I have no doubt that she is using all the means available to her to try to combat this scourge. Even so, it must be stated that the situation is very serious both in the European Union – the future enlarged Europe – and at world level. Let us also remember that it was difficult to accept this link between health and environment, and that has often been an excuse for doing nothing.

Today, it seems to me – and this concerns me a great deal – that Members and the politicians responsible are still looking for excuses not to act and give the excessive cost of investing in the environment as an excuse. I am concerned, Commissioner, because it seems to me that we do not really have our finger on the pulse as regards the health situation in the enlarged Europe.

Have you succeeded in integrating the health situation in Eastern countries and our health situation into EU policies? Today, in fact, we no longer need to prove that there are links between health and the environment and similarly between poor health and a poor environment.
Mr President, I am very pleased about this question, which gives me the opportunity to talk in a little more depth about our communication on the environment and health. This is one of the issues to which I give highest priority as Commissioner. I have to admit that it is also one of the most difficult issues of all, because it cuts through the divisions we normally see, in both the Commission and the Member States, into different subject areas and spheres of responsibility. It is necessary to work across all frontiers in order to link cause with effect, and that is not easy.

Nor is it easy to put a price on the health problems consequent upon environmental pollution. I think that the World Health Organisation has nonetheless embarked upon a very important piece of work with a view to doing precisely that and to showing that society pays a very high price both for pollution and for health problems.

Clearly, we must also tackle this issue together with the new Member States. Several of the conferences we have had in order to prepare our action plan have taken place in the new Member States. We are mobilising their experts so that there shall be no doubt that this is a pan-European way of working on these issues. We take these matters extremely seriously. We shall continue to maintain that the cost advantages are so great that it is, in actual fact, profitable for both companies and society to invest in environmental measures that also lead to our having fewer health problems.

Kauppi (PPE-DE). – (FI) Mr President, Commissioner, I share Mrs Isler Béguin’s concern. Air contamination is indeed a crucial issue as far as people’s health is concerned, and an epidemiological investigation such as this is definitely needed. This would also lend much support to giving priority to science’s Sixth Framework Programme and improving the standard, quality and coverage of environmental research. In your reply you mentioned the Clean Air for Europe programme: CAFE. Will this programme concentrate just on the quality of the air outdoors and pollution, or could the investigation at the same time include a survey of the quality of the air indoors and especially passive smoking? I am very worried that the investigation will restrict itself to the quality of the air outdoors and rather narrowly to the contamination of this type of air. Might one consider it applying to clean air in all its forms, including that to be found indoors? Could passive smoking in particular come within the scope of the survey in this programme?

Wallström, Commission. This is definitely part of our approach. There has to be a sound scientific base for any of the actions or measures we propose. We are working with the World Health Organisation to ensure that we have all the knowledge necessary and that we work on a scientific base.

I should also explain that our environment and health strategy is called 'Scale', which stands for Science, Children, Awareness-raising, Legislation and
Evaluation. This means that the action proposed will be based on scientific results. It will focus on children. We will also use legal instruments, etc. We include, where necessary, new epidemiological work, and we are trying to do everything we can to ensure that we have a sound basis and all the facts necessary to do it in a proper way.

President.

Question No 40 by María Luisa Bergaz Conesa (H-0066/04):

Subject: Power line in the Redes national park and biosphere reserve (Asturias, Spain)

The Commission considers that the project for the Lada-Velilla power line, to cross the Redes national park and biosphere reserve, will not be carried out in its current form. Will the Commission ensure compulsory examination of a complete route for this power line which would go round the protected nature reserves forming part of the Natura 2000 network, safeguard the areas where bears live and hence respect Community legislation?

Has the Commission already received the environmental impact study which the Spanish authorities, at the meeting of 4 December, promised to forward before the end of January?

If not, does not the Commission consider that the matter should be referred to the Court of Justice (a reasoned opinion was issued in April 2003) so that central government and the Community of Castille and Leon, who are already confronting each other about this project in the Spanish courts, may finally reach agreement on finding a route for the power line which ensures respect for the environment?

Wallström, Commission. The Lada-Velilla power line project mentioned by the honourable Member would cross protected areas in the autonomous communities of Asturias and Castille and Leon.

In 2001, following a complaint filed in August 2000, the Commission initiated an infringement procedure pursuant to Article 226 of the EC Treaty. This procedure, based upon obligations under Directive 79/409/EEC on the protection of wild birds and Directive 92/43/EEC on the protection of natural habitats and wild fauna and flora, reached the stage of reasoned opinion – the last step before bringing the case before the European Court of Justice – in April 2003. Currently, the procedure is aimed at modifying the non-implemented part of the project in the autonomous community of Castille and Leon.

In their answer to the above-mentioned reasoned opinion issued by the Commission, the Spanish authorities undertook to examine alternatives for the
remaining part of the project – Puerto de Tarna to Velilla – and confirmed in February 2004 that the necessary studies to comply with the requirements of Article 6(3) of Directive 92/43/EEC will start soon. These include a full environmental assessment in order properly to identify the effects of the projects on the conservation values of the affected site; if these are considered significant, alternatives will have to be examined. If no alternative can be identified that is not damaging to the site, the project can only proceed if it can be justified on the grounds of overriding public interest and if provision is made for adequate compensation measures.

In the event of significant effects on priority species identified under the directive, such as the brown bear, an opinion from the Commission may be needed pursuant to Article 6(4) of the directive.

The Spanish authorities explain that the necessary nature assessments will not be ready for ten months and that the resulting modified project will be subject to a full impact assessment procedure, in compliance with the provisions of Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment. The authorities submitted to the Commission, as supplementary information, a complete set of documents and studies concerning the original project and its likely effects on natural values. An examination of the details of the above-mentioned Spanish answers is currently underway, which will permit the Commission to decide what course of action it should take in regard to this case.

With regard to the last part of your question, the Commission would welcome and encourage a fruitful dialogue between the interested parties in order to reach an agreed solution, but it cannot interfere in the constitutional competences of the various administrations.

Bergaz Conesa (GUE/NGL). – (ES) Mr President, Commissioner, the population is concerned about the Spanish Government’s lack of transparency and also about the lack of reliable information from this Commission, which says one thing and then reforms and does another. I am just going to focus on three questions: will the Commission continue the infringement procedure rather than closing the case, as the Spanish authorities hope with its promise to modify just 30 km of the 90 km route planned, arguing that it is a new project? Will the Commission consult the Court of Justice of the European Communities at the next infringement meeting without further delay, if there are no new elements a year after the notification of the reasoned opinion and after four years of investigation of this infringement case? If the regions of Asturias and Castilla y León present it with a new project which respects all natural areas and which conform to Community legislation, would the Commission be prepared to cofinance such a project, in order to prevent the economic losses which the region of Asturias could face by dismantling the existing pylons?
The case in question concerns the part of the project that will not now be implemented. That part of the project will be replaced by a new one once the full procedure of identifying impacts and exploring alternatives has been completed. That means that it would, in any case, be a new project and that the old procedure may have to be discontinued. In that case, should the Commission consider that the new project does not comply with European Community law, a new procedure would be initiated afresh. The Spanish authorities provided information on these developments in February 2004. The infringement covers only the non-implemented part of the project. We cannot take that case to court as it stands.

President. As the author is not present, Question No 41 lapses.

Question No 42 by Patricia McKenna (H-0078/04):

Subject: Environmental letters of formal notice

Is the Commission aware of any Member State other than Ireland which has decided to discontinue the release of letters of formal notice or reasoned opinions from the European Commission? Given this decision, will the Commission itself release these documents on request? If not, why not? And if only under certain circumstances, what might these be?

Of particular concern to environmental groups in Ireland are the many cases where the Commission has determined in its reasoned opinion that directives have been infringed but has not taken any subsequent legal action. The details of the infringements are in these cases no longer part of a potential judicial process, wherefore they are not in need of confidential treatment. By releasing reasoned opinions, in particular when no subsequent legal action is taken, the Commission would ensure that citizens know that European law has been infringed, which in turn would help to reduce infringements in the future.

It appears that a number of Member States refuse to give the public access to the Commission's letters of formal notice and reasoned opinions. In the recent past the Irish authorities were willing to provide the public with copies of reasoned opinions on request, but the Commission understands that they are no longer willing to do so.

I would like to mention that, as far as possible, the Commission strives to be transparent with regard to its infringement procedures. That is why it issues regular press releases on them in order to provide citizens with information on the main issues involved.

When it comes to public access to the actual texts of letters of formal notice and reasoned opinions, certain rules agreed by the Council and Parliament need to be respected. These are set out in Regulation (EC) No 1049/2001 of the

One of these rules provides that the institutions shall refuse access to documents where disclosure would undermine the protection of the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure. Indeed, the Court has held in the Petrie judgment that, in the investigation of infringements, sincere cooperation and a climate of mutual confidence between the Commission and the Member State concerned are required in order to allow both parties to engage in a process of negotiation in the search for a settlement of a dispute. The safeguarding of this objective justifies refusing access to detailed arguments and representations. That is why the Commission itself usually cannot give public access to its letters of formal notice and reasoned opinions when the infringement procedure is ongoing. However, when none of the exceptions to the regulation apply, the Commission may provide copies of letters of formal notice and reasoned opinions. This can be the case in particular where the infringement has been resolved, the infringement procedure has been closed and there is no longer any likelihood that an investigation would be undermined.

McKenna (Verts/ALE). – I take it from the Commissioner's response that basically, if letters of formal notice have been sent out and no subsequent legal action has been taken, citizens in Ireland who want copies of letters sent to the Irish Government can in fact get them. That is my interpretation of what you have said, Commissioner.

In relation to ongoing legal action, I cannot understand who the Commission is trying to protect. If the Commission is taking legal action against Member States it would seem that the interests or the protection of Member States are given priority by the Commission and that we basically end up with a situation where citizens throughout the European Union are going to be accusing the Commission of being extremely secretive and protecting the interests of the Member States. If you have taken legal action against a Member State, surely the only thing you should be concerned about is any kind of information that would prejudice your case against the Member State?

In relation to access to documents, you are making an extremely restrictive interpretation of the regulation. In relation to the public interest, surely in many of these cases the public interest should take priority? I do not understand why the Commission is playing into the hands of the Member States. By doing this, the Commission is encouraging a culture of secrecy where Member States are not providing the information. This is going to have a knock-on effect, even in countries such as Sweden which have a tradition of much more openness.
Wallström, Commission. I want to make it absolutely clear that the Commission, along with Parliament and the Council, ought to send a signal to citizens all over an enlarged Europe that openness and transparency are what we are actively fighting for and that we want to implement them in such a way that citizens are provided with full information. The rules in question have also been agreed so that we have decision-making processes through which we can solve problems, and which allow us to deal with cases in a dignified way for both parties.

The Commission may disclose copies of the letters of formal notice and recent opinions when none of the exceptions to the regulations I mentioned apply – i.e. when the infringement procedure has been closed and there is no longer any likelihood that the investigation could be undermined. Many of the details are exchanged between the Commission and the Member State, but there is a fear that if these were in the public domain they could be used or misused in such a way that would undermine the whole procedure.

In general, I agree that we should strive for maximum transparency in these processes. It helps when Member States and the Commission are able to agree. The Commission also tries, when opening an infringement case, to disclose or give the reasons why it has opened that case against a Member State. We do not want to disclose all the details of a case, but rather to give the public an idea of what it is about.

Lucas (Verts/ALE). – I must admit I still fail to see how disclosure can really undermine the cases here, but my supplementary is about which Member States actually continue to give out the information on such letters of formal notice and which do not. Ireland used to have a more open policy than it has now. Could you please clarify, Commissioner, what the situation is at the moment as far as the other Member States are concerned?

Wallström, Commission. I wish I could give you the full list immediately, but we think that the Scandinavian countries and the Netherlands would do it, and most of the others would not. That is the situation right now, although I may have missed out one or two Member States.

President.

Question No 43 by James (Jim) Fitzsimons (H-0089/04):

Subject: UN conference on climate change

A report issued by the UN on 11 December last on Climate Change and Human Health says that climate change is affecting human health, that it is responsible
for 2.4% of the world's cases of diarrhoea, 2% of all malaria cases in 2000 and that it caused 150 000 deaths worldwide in 2000. The UN study adds that it is influencing weather patterns and air pollution and is causing water and food contamination.

How does the Commission propose to react to the guidelines issued by the UN in response to these serious problems?

Wallström, Commission. I appreciate that the World Health Organization is now raising awareness as regards climate-change impacts on human health, in a cooperative effort with the United Nations Environment Programme and the World Meteorological Organization. The Commission can support the general recommendations and conclusions of this World Health Organization report on climate change and human health because, for instance, it focuses on the precautionary principle and the principle of sustainable development. Within the Commission we are taking this carefully into consideration in the formulation of our policies.

The largest benefits of climate policies for human health can be expected from the reduction in the concentrations of ozone and particles. As climate policies in general reduce fossil fuel use, they also reduce related particulate emissions. Additional health benefits can be gained by reducing urban concentrations of NO2 and SO2. Thus, emissions-control strategies that simultaneously address air pollutants and greenhouse gases lead to a more efficient use of resources at all scales, also addressing human health concerns.

The World Health Organization report confirms earlier statements that there are still many knowledge gaps involving likely future patterns of exposure to climatic environmental changes and the vulnerability and adaptability of physical, ecological and social systems as regards such climate change. Therefore, we need better information to establish further the links between the pollutants and health effects, with a view to improving our climate change and health policies.

The action plan on which we are presently working as a follow-up to the environment and health strategy is designed to integrate this information. While the action plan focuses on a set of defined exposures and diseases in its first phase, broader issues, including those related to the health impacts of climate change, can be taken up in future phases. Moreover, the forthcoming thematic strategic on the urban environment, to be adopted by June 2005, and for which an interim communication is presently under discussion within the Commission, should also help local authorities and Member States to improve the environmental performance of cities. This in turn would also contribute to reducing greenhouse gas emissions and make cities healthier places to live.

We are also considering some projects under the Sixth Research Framework Programme. Within the activities of scientific support to policies of the Sixth
Framework Programme, research is also funded on the physical and chemical processes of air pollutants, in particular on particulate matter at the urban to regional scales, in view of their impact on human health. Under the last Research Framework Programme, the cCASHh project – Climate Change and Adaptation Strategies for Human Health in Europe – was funded to assess the health impacts of climate change.

Fitzsimons (UEN). – I wish to thank Commissioner Wallström for her detailed, informative reply and to assure her that I am aware of the serious concern with which she has always treated this matter. Indeed, in her reply, she referred to the action plan, the climate strategy and the Sixth Framework Programme. I should like to compliment her on her interest in pursuing the whole matter. I hope that the situation will continue to be monitored and will continue to improve. This issue is one of major international concern, but I know that it could not be in better hands that those of the Commissioner.

President. I would remind the honourable Members that we must ask questions as Members of Parliament. There is no need to support the work of the Commissioners so much. This is Question Time.

Question No 44 by Robert J.E. Evans (H-0092/04):

Subject: Trophy hunting

I understand that tens of thousands of endangered animals have been shot by European hunters and imported into the EU in the past five years. Is the Commission proposing legislation to ban the import of any CITES-listed species into the EU?


The objective of these regulations is to protect species of wild fauna and flora and to guarantee their conservation by regulating trade therein. In line with this objective, they have strict criteria for accepting hunting trophy imports. To begin with, import permits are required for any species listed in Annex A of the Council regulation and these include all species listed on Appendix I of CITES - (Convention on International Trade in Endangered Species of Wild Fauna and Flora), such as leopard, cheetah and elephant, and a number of other popular trophy species such as brown bear, lynx and wolf.

Before granting these permits the authorities in the relevant Member State must obtain scientific advice that the management of the trophy hunt in the country...
concerned is based on sound biological data, that harvest levels are sustainable and that illegal activities are under control.

There is one further requirement to which I shall especially draw your attention. Trophy hunting of these species must generate significant and tangible conservation benefits for the species and for the local people who share the area with or suffer as a result of the species concerned. Trophy hunting programmes that meet this criterion can play a vital role in conserving rare species, especially in developing countries and in encouraging local communities to value them as a resource that needs protection from other more damaging uses.

I am aware that in a number of countries, including Namibia, South Africa, Botswana and Tanzania, carefully managed trophy hunting provides a major contribution to their relatively successful conservation efforts.

While many people find the concept of hunting trophies distasteful under any circumstances, the Commission considers that a general ban on the import on any CITES-listed species would not be in the best interest of species conservation and the sustainable use of resources. However, in cases where the criteria for accepting hunting trophies are not met, the Commission has always taken, and will continue to take, the appropriate measures to suspend such trade.

Evans, Robert J.E. (PSE). – I am alarmed to hear the Commissioner's conclusions because it certainly does not seem that the trophy hunting to which I referred is being done with the aim of conservation at all. I logged on to a website this afternoon, which would have given me the opportunity to go to Tanzania. It offers the 'discerning sportsman' the ultimate hunting experience: large buffalo, lion, water buck, very rare East African sitatunga, leopards, antelopes, etc.

My information is that in the last six years British people have been abroad and shot at least 40 African elephants, 32 leopards, 18 polar bears, six hippos – I could go on. Worldwide, this is something like over 3 800 African elephants, over 2 600 rare leopards and 9 000 bears. These are not being slaughtered in the interests of conservation, or with any reference to conversation in the areas. It is trophy hunting: people who go out and shoot big game and come home proudly but sickeningly with a trophy of the head of a rare animal.

Would the Commissioner think again, and would she agree to meet me to go through some of these statistics, to see some of the evidence and to put in place a ban on the import of CITES-listed animals into the European Union?

Wallström, Commission. How could I refuse a meeting with a Member of the European Parliament? I would be happy to meet with you; we could go through my reply, the Commission's position on this matter and the criteria that I
We do not accept all types of trophy hunting. We certainly do not accept the subsequent selling of such 'trophies'. We have every reason to meet and go through the current situation.

It is also true that, done in the proper way, this can be a very important area of conservation in some of the countries concerned. Those countries may get something out of this that means they will be better able to manage these resources and wild animals – we also have some good examples of that. I am fully aware of the reports we have received and also of some very worrying trends, so I am more than happy to meet. I also welcome nice comments from Members of Parliament!

McKenna (Verts/ALE). – It beggars belief that, in a so-called civilised society in the 21st century, there is still trophy hunting. It is horrific! It goes back to colonial times when the British came back from the colonised countries and hung their trophies on the wall. We should have got past this stage. It is ridiculous.

I agree with Mr Evans about CITES-listed species. There should be a ban on them. It is not acceptable. Apart from that, it is clear that there are illegal imports of trophies into the European Union; surely there must be some way of ensuring that this does not happen. The European Union puts huge resources and effort into keeping out so-called illegal immigrants, yet it cannot stop the illegal import of trophies. We should get our priorities right. Let people in, not these trophies.

Wallström, Commission. I am the first to agree that this is all about how it is being done and that we should not allow something that is illegal. We have to pursue the culprits in this area. We must implement the rules that are in place.

As I said, import permits are required for any of the species listed in our annexes to the Council regulation. These correspond to the CITES listing as well. We need to make sure that we have a judicial procedure and that we counteract illegal imports.

Isler Béguin (Verts/ALE). – (FR) Commissioner Wallström knows full well that hunting raises a lot of passion in France, but I do not want to catch her off guard. I would like to ask an additional question about hunting as it is currently practised in the future Member States, the Eastern countries.

Are you aware that hunters from the West, from the Fifteen, go in great numbers to hunt in these countries, because the fauna is still very interesting and there are still major trophies – bears and wolves – to bring back? In terms of the
Community acquis and the implementation of Natura 2000, do you not think that Western hunters are damaging the wild fauna there, before its time, in search of trophies?

Wallström, Commission. (SV) The rules are such that the new Member States must already have implemented the nature protection directives before they join the EU. It is therefore incredibly important to follow matters up and ensure that this happens, so that no hunting takes place that infringes the existing directives designed to protect wild birds, animals and various other creatures.

President. As the time allocated to Question Time is at an end, Questions Nos 45 to 66 will be answered in writing (4).

That concludes Question Time to the Commission.

(The sitting was adjourned at 7.05 p.m. and resumed at 9 p.m.)

IN THE CHAIR: MR INGO FRIEDRICH
Vice-President

(3) See Annex 'Question Time'.
(4) See Annex 'Question Time'.

Quality of ambient air


Wallström, Commission. Mr President, air pollution continues to be a serious problem in Europe. An oral question tabled for this part-session, which I replied to before the dinner break, illustrates the point by quoting from the World Health Organization study on the number of cases of premature deaths or serious illness caused by air pollution.

Even though we have made considerable progress in reducing concentrations of some pollutants, such as sulphur dioxide or lead, other pollutants continue to pose a threat. That is why the Commission is continuing to pursue a vigorous
policy against air pollution. We have under way a large programme called Clean Air for Europe to prepare for the thematic strategy on air pollution due to be adopted next year. This programme focuses especially on some of the most widespread problems, such as particulate matter and ground-level ozone.

We are also looking at other types of pollution, which also have important consequences for human health. Among these are the pollutants which are the subject of the proposed directive being discussed today, the heavy metals arsenic, cadmium and nickel, polyaromatic hydrocarbons and mercury. They are, in fact, the last in the list of pollutants mentioned in the Air Quality Framework Directive of 1996 as requiring specific action. Three daughter directives have been adopted so far, pursuant to that directive, covering all the other pollutants on the list. The directive being discussed today thus forms the last in a series of legislation provided for under the framework directive.

An important aspect of the proposed directive concerns monitoring. Currently, we do not have enough information on how widespread these pollutants are and we urgently need more data. For the heavy metals we have decided not to propose any limits or target value, since the main problems occur in the immediate vicinity of certain industrial installations, and levels that can be easily achieved elsewhere would not be achievable in these areas without taking disproportionate measures, even leading to shutting down the installations.

But that does not mean that nothing can, or will, be done to reduce the levels of pollution. These installations are covered by the IPPC Directive and best available techniques will therefore have to be applied to reduce emissions by 2007. By ensuring adequate monitoring of concentrations near these sources and making results available to the public, this directive will help to ensure that the operators of these installations take the necessary measures to keep emissions as low as possible.

For polyaromatic hydrocarbons the problem is not limited to such a small number of sources, so we have proposed a target value obliging Member States to take all necessary measures to reach the required level, as long as they do not entail excessive costs.

I am aware that there is a wish to go further than we have in setting binding limit values for some of these pollutants and I fully sympathise with the desire to protect human health that this reflects. At the same time, it seems highly doubtful that there would be any real advantage in setting binding limit values that will simply be unachievable and would therefore need to be the subject of derogations or exemptions in the very places where the main problem occurs.

From that point of view I welcome the decision to postpone the vote on this subject to allow for alternative possibilities to be explored. In any case, by ensuring a high level of monitoring in the worst affected areas and setting a target value for polyaromatic hydrocarbons where the sources are more widespread, the directive as proposed will make an important contribution to
reducing this type of pollution, raising public awareness and making Europe's air safer to breathe.

Kronberger (NI), rapporteur. – (DE) Commissioner, Mr President, ladies and gentlemen, what we are dealing with here is the fourth daughter directive to the Air Quality Framework Directive, which already has three adopted daughters, the first on sulphur dioxide, nitrogen oxides, particulate matter and lead, the second on benzene and carbon monoxide and the third on ozone. In the first two cases, limit values were sought and were duly enshrined in the directives. The so-called mother directive, in other words the overarching framework legislation, also calls for limit values in respect of arsenic, cadmium, nickel, mercury and polycyclic aromatic hydrocarbons. This is the basic requirement. In the case of ozone, the framework directive only provides for a target value, and the third daughter directive set the target accordingly.

In the present discussion on this fourth daughter directive, there are three positions: the Commission has adopted the position that monitoring is enough and sets a proposed target value for benzopyrenes. This, in my view, is contrary to the framework directive, and I know of earlier Commission drafts in which limit values were set. The Commission, then, has already deliberated on this point. The Committee on the Environment, Public Health and Consumer Policy voted by a very narrow majority of 26 to 24 for limit values. These limits did not come from me, because I was pretty poor at chemistry in my schooldays, but from experts from the Commission, international experts and a committee of people with a sound scientific grounding. In short, these limit values are feasible from the Commission’s point of view, which, in this case, we have endorsed.

There are very many indications from industry too that these target and limit values can be achieved. We also voted in the Committee on the Environment for the omission of the original requirement for a time limit for industrial areas where these values are difficult to achieve. In other words, we were very responsive to the needs of industry, telling them that, where damage had been done to their environment in the past, where there was a history of pollution, they were not actually expected to achieve the targets within a very short period. In addition, the Committee on the Environment commissioned a study from the Institute for European Environmental Policy. The study likewise confirms the feasibility of limit values.

The third position is that of the Council, with which we have already conducted preliminary negotiations and maintained contacts and dialogue. In the view of the Council, or a potential majority of the Council, target values are also conceivable. This point will undoubtedly be the focus of future discussions too.

We certainly must be clearly aware of the significance of these heavy metals. They are genotoxic human carcinogens, which, even in minimal doses, effect a change in DNA – in people’s genetic make-up. There is definitely a need to
appreciate fully what is at stake here.

The line of argument adopted in the Commission document, namely that it is all a matter of cost-benefit analysis, of weighing the cost of filters or technical measures against potential savings from a reduction in the number of people dying from cancer, is, to my mind, extremely cynical. The second step, namely an assessment of the secondary benefits in terms of a lower incidence of disease, has not been taken at all, because such benefits are difficult to quantify. Such a cynical line of argument will not wash with the bulk of the European population.

We have postponed tomorrow’s vote with the intention of trying to reach an agreement with the Council before the end of the present legislative term. I am pleased that the Commissioner shares my view that we can perhaps use these remaining weeks to reach a compromise that will ultimately enable us to look one another straight in the eye.

Jackson (PPE-DE). – Mr President, this report illustrates the need for Parliament to put in place a systematic approach to impact assessment. In this instance, the rapporteur Mr Kronberger with, as he admits, slim support by two votes from the members of the committee, is proposing to change non-mandatory target values to mandatory limit values for arsenic, cadmium, nickel and benzopyrene.

The Committee on the Environment, Public Health and Consumer Policy informally sought – and this was the first time it was carried out – a cost-benefit analysis. There is no mechanism yet within Parliament for this. The trouble is that it is inevitably incomplete, given the time pressures within which we had to operate. It concludes, and Mr Kronberger has drawn comfort from this, that some of the proposed limit values are achievable – ‘feasible’ in his words. That is a technical assessment. When the study comes to look at the costs of reaching the target, as the Commissioner said, things are not so rosy. In the study drawn up for Parliament, the precise costs of reaching the limit values that Mr Kronberger wants are not analysed in any systematic way. The study itself says that, for arsenic, some plants might be able to comply but some could not and that ‘a more detailed analysis of the reasons why compliance by the other plants will be impossible seems to be justified’. The rapporteur, faced with the impossible, prefers to ignore this stark verdict.

In the case of the application of limit values to cadmium, the study again draws attention to the lack of detailed information on the impact of what Mr Kronberger proposes. In the case of limit values for nickel, the study notes that applying limit values on the Kronberger lines would require investments beyond best available techniques.

What Mr Kronberger now has to demonstrate is how far what the Commission proposes constitutes a proven danger to human health, how this danger is
inadequately dealt with through the provisions of the IPPC Directive and why therefore it is worth pursuing his idea for mandatory limit values irrespective of the cost. In my view, he has completely failed to demonstrate that and all we have is the bald observation in his explanatory statement that 'no limit value can be set below which these substances constitute no risk to human health'. There is no way in which he is capable of going in the direction of what the Commission is proposing.

If Parliament is unwise enough, in a first reading compromise or in a second reading – which might be a long way ahead – to endorse what Mr Kronberger wants, then it will only have itself to blame if the Council, or perhaps the Commission, carries out the real, extensive cost-benefit analysis that Mr Kronberger does not have. Arriving at a point where cost-benefit analyses are on our agenda is not a sign of obstructionism, it is a sign that Parliament is at last long moving from seeing itself as a pressure group for the environment and evolving into a responsible part of the legislative process. But with the Kronberger report as it is, we clearly have a long way to go.

Mr Kronberger and the Commissioner have mentioned the possibility of a first reading agreement. I cannot see how on earth there can be a first reading agreement between Mr Kronberger's approach and that which, I imagine, the Council has endorsed. I would like to think we could have a first reading agreement, but somebody has got to move and I hope it is Parliament.

Lange (PSE). – (DE) Mr President, Commissioner, ladies and gentlemen, we all know, of course, that we are not floating in a vacuum and that one of our objectives is to occupy the strongest negotiating position. And it goes without saying that the position of the Committee on the Environment, Public Health and Consumer Policy is also a negotiating position, as my honourable colleague Mrs Jackson knows from her own political experience. We want a clearer definition of the aim we are trying to pursue, and rightly so. To that extent, Commissioner, however much I normally value your work, I am not entirely happy with the proposal, because it essentially offers nothing more than a system which will result in new sets of measurements – and let me say in passing to Mrs Jackson, who normally attaches great importance to the cost factor, that these measurements will be expensive, creating costs for the local authorities, regions or national governments that have to fund these measuring stations.

Nevertheless, we are aware of the dangerous nature of these heavy metals. In this respect, merely saying that we intend to take measurements is not the right approach, nor is it the most cost-effective. We must clearly indicate the direction in which we intend to proceed. As I said, the position of the Committee on the Environment, Public Health and Consumer Policy is, quite evidently, a negotiating position too. When we negotiate with the Council, positions will naturally shift. That is perfectly obvious, and for this reason I
advocated postponement of the vote, precisely to have this time for negotiation.

The aim, though, is to make it clear what direction we intend to take in this area of our policy on air quality. I am not such a dogmatist that I would absolutely insist on enshrining particular target values and regarding them as non-negotiable, but we must make clear statements about the ultimate aim if we are to prevent the emission of hazardous substances into the environment, into the air we breathe.

If we look at the ways in which most of these hazardous substances, such as cadmium, chromium or nickel, enter the atmosphere, we find that they are generally emitted in areas with high population densities. This is why I have received letters from many local authorities asking us to set binding limit values so that they can deal better with their situation on the ground. But I do not see that as a solution. We must take full advantage of all the possibilities offered by technological progress to reduce emissions. For this reason, we need target values, coupled with clear statements as to how and when they can be achieved. In this respect I am confident, Mrs Jackson, that we can reach an agreement in our negotiations with the Council at the first reading, an agreement which clearly conveys the message that we wish to avoid emissions of these heavy metals altogether wherever possible.

Breyer (Verts/ALE ). – (DE) Mr President, ladies and gentlemen, I can endorse what the previous speaker has said. I believe we are being dishonest if we are only holding a debate here for the sake of debating, if more measurements are to be taken just to delay the project. What we need – and this has emerged with unmistakable clarity – are binding values. Anything else is contrary to the precautionary principle that we have propagated time and again in all other cases and is contrary to our repeated pledges to protect human health.

Mr Kronberger reiterated emphatically that these substances are genotoxic carcinogens, that we have irrefutable evidence of their carcinogenic effects, that they affect kidney functions, the central nervous system, respiratory organs and the immune system. What we actually need here is time to negotiate, but not to delay or shelve the matter or, as many in this House, unfortunately, would seek to do, leave it lying in the drawer. What is wanted – and this message will be heard from politicians in the forthcoming election campaign too – is a set of clear and binding targets for local and regional authorities, targets designed solely to improve the quality of people’s lives.

Blokland (EDD ). – (NL) Mr President, Commissioner Wallström, rapporteur, ladies and gentlemen, it has been known for many years that what are termed heavy metals and PAH (polycyclic aromatic hydrocarbons) are, to a greater or lesser degree, harmful to the environment and to public health. These substances do not belong in the ambient air. In my opinion, the impact studies do not
contribute a great deal in this respect. These studies cost a lot of money and leave us politicians with as much uncertainty. I take the view that we should make every effort to remove those harmful substances from our ambient air as much as possible. The Commission has opted only to monitor pollution. This is, I think, too restricted, and I fundamentally object to this approach. The quality of ambient air is not improved merely by mapping out pollution. As the other daughter directives do include binding limit values, I fail to understand why this was not done in this case.

I also realise, though, that we must have our feet firmly on the ground; it may be that the limit values from the previous daughter directives were too strict. However, this does not mean that we should decide now on non-binding target values. In the Committee on the Environment, Public Health and Consumer Policy, I backed the approach taken by the rapporteur, Mr Kronberger. He is currently negotiating with the Council about an agreement at first reading. This is a noble pursuit, in my view. Since the outcome of these negotiations is not yet known, it is impossible for me to take a stand in this. I would, however, like to say to Mr Kronberger that we should obviously not prescribe any binding limit values that fall below background concentration levels.

I am expressly pleading in favour of realistic limit values. It is, for example, known that emissions are, to a large extent, caused by diffuse sources, for example by the heating of houses and transport, which it is extremely difficult to deal with. Results can, however, be achieved in various sectors in industry; the metal industry springs to mind, as do power plants, waste incineration plants and the waste recycling sector. In the case of waste incineration, a considerable amount of heavy metals are released. The exact amount is unknown because the obligations for measuring emissions are very basic. Binding limit values should therefore also be introduced for the benefit of various sectors in industry, as well as the obligation to measure emission levels. I hope that we can reach agreement with the Council on this matter.

Korhola (PPE-DE). – (FI) Mr President, the Air Quality Framework Directive of 1996 provides the basis for the act now under discussion and three earlier ones. The framework directive lists the air pollutants for which limit values, target values and, where necessary, alert thresholds must be laid down.

The Committee on the Environment, Public Health and Consumer Policy accepted 60 amendments to the Commission’s proposal and in this way it, as well as other issues, were brought more in line with the three earlier directives on the quality of ambient air.

This integrated package on the quality of ambient air now being finalised will be an effective way of preventing air pollution in the EU, except in one important area: small particles. At the present time it is difficult to measure the tiniest particles of all and for that reason it is in practice impossible. It is the human body, however, that is most defenceless against these smallest particles.
Whilst larger particles get trapped at different points in our respiratory organs, the smaller ones get straight into our lungs, and there they remain. The risk to health is obvious.

The Commission’s technical working groups are, in my opinion, the right place to assess the risk of particles and the possibility of measuring them. The experts in different areas in these working groups should formulate opinions on individual pollutants, based on current knowledge, and so present data that proposals for directives can be based on. As the package of four directives on ambient air quality is now being finalised, the working groups should be given the task of dealing with the problems relating to small particles with the aim of establishing common methods and assessment criteria in the Member States. This would be an essential addition to the list of Community objectives to improve air quality and promote public health in the Member States.

Bowe (PSE). – Mr President, Mr Kronberger already knows my opinion on this report as I have expressed it quite strongly in the Committee on the Environment, Public Health and Consumer Policy. However, I should perhaps be more moderate in my views tonight.

He may be quite passionate in his opinions but frankly they are misjudged. He might be quite earnest in the conclusions he arrives at but frankly they are erroneous. He must now face the reality that if he wants to regulate emissions of this kind from the industrial installations we are talking about, setting emission values just does not work. The impact on those installations of trying to impose such standards would be unbearable.

Nevertheless, I have one or two kind things to say about his report. Like the curate's egg in English parlance, it is good in parts. If you look at mercury and arsenic, for example, there may be a case for trying to set emission values in this sector, but certainly not in others. Take for example nickel. Nickel is one of the most important elements used in the production of stainless steel. The most common type of stainless steel contains 18% of nickel, but it can contain up to 30%. The nonsense of this proposal is that it assumes the measures used to control gaseous emissions of nickel can be applied to the situation in steel plants where nickel is emitted as a fine dust during the production process. In reality, the vast amounts of dust in the production area contain only a very small amount of nickel and the emissions from steel plants are relatively small. To try nevertheless to reach emission values in such a situation would be impossible.

Again in the case of polycyclic aromatic hydrocarbons, the kind of measure proposed by Mr Kronberger will inevitably lead to the closure or end of use of coal-fired power stations, to the end of coal burning being used, to a loss of jobs and, across the whole of Europe, to an even greater reliance on imported gas and other supplies.

However well-meaning, these proposals are unrealistic, ill-considered and
would undermine Europe's reputation for taking a responsible approach. I would urge him to think again.

De Roo (Verts/ALE). – (NL) Mr President, Mr Kronberger's report receives unqualified support from the Group of the Greens/European Free Alliance. Limit values are needed, for example for arsenic. This is a real problem in my country. The town of Coevorden near the German border has made the decision to incinerate virtually all the old railway sleepers in Europe, thus releasing the arsenic from them into the ambient air. That is completely wrong and that is why we need strict limit values. If these cannot be put in place straight away because the political majority is not in favour, that is extremely regrettable, but these heavy metals are carcinogenic and their use has to be curbed. If that is to be done via target values as a short-term measure, then that receives my reluctant agreement. However, in the longer term, limit values definitely have to be introduced on the basis of one extra cancer case in one million cases. We adopted exactly the same guiding principle for the drinking water directive, which was accepted by the Commission, the body that had proposed the principle, the Council and Parliament. Why do we not do the same in the case of arsenic, cadmium, mercury and nickel? That would be the way forward towards a possible compromise.

Myllyranta (PSE). – (FI) Mr President, I think this is such an important directive that there is very good reason here to speak passionately about this subject. It is one, as has already been said here many times, that concerns carcinogenic heavy metals and polycyclic aromatic hydrocarbons (PAH), quite small amounts of many of which damage the genotype of cells. The objective is to prevent and reduce the harmful effects of air pollutants on human health and the environment. It has also already been said here that this directive differs from the earlier daughter directives in that this one does not propose binding limit values. This has been justified by the fact that it is not possible in the short term to find cost-effective measures.

One might also argue that, if limit values were set, they would then lead to cost-effective measures having to be found. We have many examples of situations where technical solutions have also been found once clear targets have been set and there is enough incentive to meet them. Monitoring and measuring together are an important element in this directive, and greater attention will have to be paid to the comparability of measuring techniques and results both nationally and at Community level. Effective monitoring will mean it will be possible to set new binding limit values as new technical applications are established. The measurements must, however, be carried out cost-effectively, taking different circumstances into account.
Wallström, Commission. Mr President, as I have already mentioned, I fully sympathise with the wish to ensure the full protection of public health as expressed in the amendments seeking to introduce binding limit values for arsenic, cadmium, nickel and polyaromatic hydrocarbons. Unfortunately, I do not believe that the proposed amendments would have the desired effect. In reality, limit values would have to be accompanied either by exemptions for certain areas or by provisions allowing Member States to apply for derogations in cases where the limit values cannot be met. The proposed amendments envisaged the latter solution, but either way we can be sure that derogations will be granted in precisely the areas where the problems occur. It is difficult to see how this would result in public health being better protected. Similarly, there is little point in setting long-term objectives without having a clear idea of how such objectives can be met. For these reasons, the Commission cannot, at this stage, accept any of the amendments that seek to introduce binding limit values.

On the other hand, the Commission could accept the reintroduction of the concept of upper and lower assessment thresholds foreseen in the framework directive, which is the subject of six of the amendments tabled. Although this concept is usually linked with the limit values, the concept has some advantages, even in the absence of limit values, since it provides a flexible regime where the degree of monitoring requirements depends on the level of observed concentrations.

As I said earlier, I am glad that the decision has been taken to postpone the vote to allow time to explore further alternative possibilities. I very much hope that, as a result, we will be able to move quickly towards an agreement on this important subject.

President. Thank you, Mrs Wallström.

As you know, the vote has been deferred to a later sitting.

The debate is closed.

Agriculture

President. The next item is the joint debate on the following two reports, presented on behalf of the Committee on Agriculture and Rural Development:

- **A5-0123/2004** by Mr Daul on the proposal for a Council regulation amending Regulation (EC) No 1782/2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers;

- **A5-0106/2004** by Mr Lavarra on the proposal for a Council Regulation on the common organisation of the market in olive oil and table olives and amending Regulation (EEC) No 827/68.
Mr President, ladies and gentlemen, first of all, I should like to thank Mr Daul and Mr Lavarra and the co-rapporteurs, Mrs Rodríguez Ramos, Mr Berlato and Mr Mayer for their reports, and the members of the Committee on Agriculture and Rural Development for their contributions.

Back in July of last year, the Council of Agriculture Ministers invited the Commission to prepare reform proposals for additional product categories in accordance with the same principles on which the previous reforms had been based. As a result of this, the Commission drafted proposals for cotton, tobacco, olive oil and hops, and these proposals are the subject of today’s debate.

The aims have remained the same: we want to make these sectors more competitive and sustainable, to simplify administration, to create a more WTO-compatible system and to promote rural development. With regard to the budgetary effects, the Council decided that the Commission was to present a proposal with no net budgetary impact. Our proposals fulfil all these aims and conditions.

As in the previous reforms, the key element in these is ‘decoupling’, severing the link between production volumes and direct producer support, although the Commission, in order to take the greatest possible account of environmental and social sensitivities, has proposed partial decoupling in some instances. As with the previous reforms, however, the prerequisite for the payment of the full amounts is that farmers meet the requirements of cross-compliance and good farming practice. Provision is also made in these proposals for a transfer of resources to rural development. The radical restructuring of the sectors under discussion also enables us finally to abolish some elements of previous market-organisation regimes that have now become obsolete, such as the export refunds for olive oil.

I am well aware of the socio-economic and environmental significance of the crops we are debating today. With two and a half million producers, olive oil commands a prominent position in Mediterranean agriculture. Cotton plays a key role in some parts of Greece and Spain. Hops are a special crop of primarily regional importance, while tobacco, though an important element in the agricultural and employment structures of many regions, is engulfed in an economic crisis on the one hand and is associated with an unhealthy lifestyle on the other.

I believe that the proposals on the table in their entirety respond to the needs of the Community, and for this reason I am opposed to the divergences from the original text that the Daul report proposes. For all four crop categories, the proposal is the result of careful reflection and is in tune with the GAP reform package that was adopted last June. It gives farmers the freedom and flexibility to farm their land as they see fit and to take advantage of market opportunities,
and at the same time it takes account of environmental and social concerns.

Let me also point out that it is important for us to take the requisite decisions, since unless a decision is made on this package, including tobacco, we run the risk of being unable to provide any financial support at all to tobacco-growers next year, because the existing arrangement expires at the end of this year. I do not believe that such an approach would be in anyone’s interest. For this reason, I can only invite the House to take the necessary decisions.

President. Thank you, Mr Fischler.

I am certainly pleased that your remarks about association with an unhealthy lifestyle did not extend to hops.

Daul (PPE-DE), rapporteur. – (FR) Mr President, Commissioner Fischler, ladies and gentlemen, first of all I would like to say that I will limit myself to a general issue since we have rapporteurs for each product who will, therefore, each elaborate on a particular issue. The Committee on Agriculture and Rural Development reached a compromise agreement on 19 February 2004 within the framework of the project on the reform of the common agricultural policy for tobacco, olive oil, cotton and hops.

We are not losing sight of the fact that this is about adopting a single European Commission regulation, which will amend the principle of the single payment scheme. A global agreement needs to be reached and not independent agreements for each sector. The whole of the negotiation process is interdependent. The Commission and the Council have the ambitious goal of reaching an overall agreement very quickly. As Commissioner Fischler said, we must not have a legal vacuum, especially in the tobacco sector.

The Committee on Agriculture and Rural Development considered that the principle of decoupling aid, as proposed by the Commission, can only apply if several external elements are also taken into consideration, particularly the fluctuation and development of international agricultural prices as well as the very marked contrast between internal and external prices.

The agricultural policy for Mediterranean products must move towards supporting the work of small farmers and family farming and protecting the number of jobs – hundreds of thousands of them – in rural areas. Any plan for reform must present all the possible alternatives to guarantee the future for farmers and affected regions, and must take into account the social importance as well as the different production situations in the Member States. The members of this Parliament’s Committee on Agriculture and Rural Development have shown their preference for a greater appropriation of agricultural funds for the market aimed at measures for rural development in
order to improve, in particular, the environment and quality production.

Assuming that a significant number of farmers decide to cease production and receive subsidies, the fact of granting agricultural aid independent of production should not in any case increase territorial problems and create an imbalance between different sectors. On the contrary, the principle of partial decoupling should allow for more equal remuneration for all farmers and for all production by applying the principle of multifunctionality. Partial decoupling at a production level is to allow for evolution rather than revolution in our Mediterranean regions.

The European agricultural model must be supported. Europe needs its farmers and needs to support the population in its rural areas. We must protect the interests of our farmers at World Trade Organisation level. As recent budgets for the United States show, US agriculture will once again benefit from a substantial increase. Follow their example, Commissioner! I would add that this substantial increase is expected.

We know that your work in the Commission is not easy, but we know your common sense and your pragmatic nature, so we ask you to agree to the compromise proposal, which is a good one, put to you in the Committee on Agriculture and Rural Development.

Berlato (UEN), co-rapporteur. – (IT) Mr President, Commissioner Fischler, Mr President-in-Office of the Council, ladies and gentlemen, I was the co-rapporteur for the tobacco part of this important report on the reform of the common organisation of the markets in certain Mediterranean goods. As you know, the aim of the European Commission, which it stated explicitly, is to end the production of tobacco in Europe. This is the first case of forced elimination of a product with historic roots in our continent and which, moreover, is not experiencing a market failure.

I would like to point out here the main and most obvious consequences in the event that the Commission’s proposal is approved. The consumption of tobacco products would not fall and there would be no beneficial effect on the fight against smoking which we all support. There would be no beneficial effect on Member States’ tax takings, which in the European Union total between EUR 15 and 65 million a year just in terms of final consumption taxes on tobacco products. There would be a significant worsening of the European Union’s trade balance following increased imports and reduced exports, with a deficit of more than EUR 800 million a year, equivalent to current Community spending on aid for tobacco producers. Four hundred and ninety thousand people would lose their jobs, in terms of workers in the industry and 10 000 holding owners who, leaving aside the temporary receipt of a payment decoupled from production, would in any case lose their jobs as the lack of economically viable agricultural alternatives in tobacco-producing areas has been amply demonstrated; there would therefore be multitudes of newly unemployed people in the European
regions which already have the highest unemployment rates of the current 15 Member States of the Union, and the same would happen in the tobacco-producing regions of the ten new acceding countries, also in view of the fact that over 50% of workers in the European processing industry are women. Other consequences would be: the closure of hundreds of European companies involved in the primary processing industry and ancillary activities whose existence depends on local availability of the agricultural raw material, with a consequent massive decrease in the taxes paid by the companies and their employees and an even more severe deficit in terms of social security contributions; vast rural areas of the poorest regions of Europe would turn to desert, considering that 80% of European tobacco is grown in Objective 1 areas; there would be a general impoverishment of local systems where the production and processing of tobacco is highly concentrated, which in many cases forms the backbone on which a complex economic and social system is grounded and which currently provides the populations with dignified living conditions.

For the reasons and arguments briefly set out so far, clearly approval of the Commission proposal would, apart from anything else, run counter to the aims of the CAP laid down by Article 33 of the Treaty, which deliberately is not cited as the legal basis of the proposed reform.

I would conclude with an appeal to all my fellow MEPs, in particular those Members from the central and northern European regions since, as we know, tobacco is only produced in certain very specific areas of southern Europe. Hundreds of thousands of families in the European Union, whose future depends on ...

(The President cut off the speaker)

Cercas (PSE) deputising for the rapporteur, Maria Rodríguez Ramos. – (ES) Mr President, Commissioner, Council representatives, I shall devote the first part of the time available to me to speaking on behalf of Mrs Rodríguez Ramos, who is unable to be here as planned to defend her report on cotton. She would, however, like to me to emphasise that without exception, all CAP reforms in Europe have allowed over ten years for the activities affected to adjust gradually to the changes entailed by changing from a policy of price support to a system of support for producers. This has been the case for all changes to the CAP, dating right back to the McSharry report through to Agenda 2000.

Commissioner, the current reform of cotton production began in 2001. You are now proposing to institute further reform, without any prior environmental impact assessment. I shall return to this point later. You have also failed to appreciate that your plan is in contradiction with the policy enshrined in the protocols annexed to the Acts of Accession of Greece, Spain and Portugal. I would remind you that supporting the production of cotton in producer areas was one of the objectives contained in those protocols. Your final objective is
actually complete decoupling. We believe your proposal will result in the production of cotton being discontinued. The Commission seems to be fully aware of this. In addition, action is being taken although no valid assessment of the sector has yet been carried out.

The Commission must be aware that cotton production is concentrated in very backward areas. It must surely understand also that ginning and other related activities are likely to be seriously affected. Let me make the following quite clear to you, Commissioner. There is no alternative crop that could possibly be produced by the farmers affected. Regulation (EC) No 1783/1999 prevents them from planting fruit or vegetables. Surely, Commissioner, you are not expecting those farmers to plant maize, thus penalising other producers of maize or beet, because of the quota system? Further, what is to become of the industrial sector?

By contrast, the compromise put forward by the rapporteur does take account of all these factors. It is also in line with the CAP reform guidelines and with agreements reached with the WTO. It would mean all aid to cotton could be taken out of the amber box. I therefore hope we can count on your support, Commissioner, in the effort to prevent the disastrous consequences the proposed reform would have for jobs. It would also have a negative impact on certain areas of my home country. By way of example I could mention Andalusia, an Objective 1 region where serious social concerns exist. Mr Berlato mentioned them earlier.

As regards tobacco, I endorse everything Mr Berlato said. I fully agree with the view he put forward. I would also like to suggest that you read your own regulation again, Commissioner. That should prevent you from repeating statements of the kind you made this evening, namely that no drastic consequences will ensue. The regulation actually states that total decoupling is liable to result in the demise of the sector of production concerned, and that this is particularly likely in the case of tobacco. Nonetheless, Commissioner, you have proposed total decoupling. Your reasoning was inappropriate and misleading, and you presented arguments we all recognise as hypocritical. It is not the case that the Council failed to adopt specific decisions on tobacco at the Gothenburg Council. I think you should also admit, Commissioner, that you have only included the views of the health sector in the environmental impact assessment, and that there is no reference to experts’ views.

The Commission has attempted to justify itself by reference to reform of the CAP. In fact, despite the statement you have just made, Commissioner, only partial decoupling was discussed in June. Nonetheless, you are advocating total decoupling for tobacco and cotton. You are doing so despite being fully aware that these crops are vitally important to certain Objective 1 regions in Europe in terms of both production and employment. Do you not find it contradictory to argue along these lines in the case of such a particularly labour intensive crop? The livelihoods of the tobacco producers are at stake. So too are thousands of related jobs. Indeed, the future of entire villages and regions is threatened.
I find it hard to believe you are actually proposing such a drastic measure, Commissioner. I simply cannot understand how you can be suggesting an abrupt end to the production of these crops, without any transitional period. After all, these are particularly sensitive regions of Europe. I could give you any number of reasons against such a move, Commissioner. As time is short, however, I shall mention just one of them. All sides in this House have striven to come up with a reasonable, just and fair solution. Each of them agreed to compromise on something. Everyone recognises the need to make an effort to find a flexible solution for the Member States, a solution that would also allow the sector to begin to adjust.

The proposal you have put to the House falls far short of this, Commissioner. I therefore appeal to you at least not to prevent the major political agreement reached in Parliament from providing a way forward for the tens of thousands of families that perceive you as an enemy threatening the future of their family and their professional lives. That is certainly how you are perceived in my home region of Extremadura.

(Applause)

Lavarra (PSE), rapporteur. – (IT) Mr President, Commissioner Fischler, ladies and gentlemen, the opinion, which Parliament’s Committee on Agriculture and Rural Development adopted by a large majority on the basis of my report, considers the Commission’s proposal on olive oil to be a good starting point. Accordingly, with our pronouncement we are seeking improvements, but also significant adjustments. Indeed, we intend to maintain the income of able olive producers until 2013 and safeguard the environmental and socio-economic value of olive growing, but we go further than the Commission proposal in strengthening the aspects of food quality and safety, combating fraud, transparency of labelling and new specific support for young persons who need incentives to enter the olive-growing sector.

With regard to the aid system, in our view, the extreme variability of socio-economic and environmental conditions suggests that we should make the decoupled percentage flexible, starting from a minimum of 60% in any case. We believe that the option of increasing this minimum may only be considered and implemented when there is no risk of grubbing-up or that production will be abandoned. To simplify things and to obtain much more considerable resources than those provided for in the Commission’s proposal, with reference to improving quality, we propose combining aid for olive groves and aid for quality in one single measure and entrusting its management to producers’ organisations, since the fragmentation of our olive farms would not allow an appropriate relationship with the market. We also believe that the Member States should, as with all the other products, have the power to postpone the entry into force of the reform until December 2005 or 2006.

It is particularly important to have appropriate rules that guarantee an adequate
income on the global market for the whole of the Mediterranean olive sector, putting the conflictual rivalry between the Mediterranean countries, as advocated at the recent conference of Euro-Mediterranean agriculture ministers held in Venice on 27 November 2003. In other words, we need clearer, transparent legislation, which is being called for by the producers, but also and especially by consumers, who expect and are entitled to have clear labels and correct information, in order to be able to identify high-quality, healthy products, as extra virgin olive oil has been scientifically proved to be.

Parliament is once again calling for a more satisfactory oil classification system, the prohibition of blends of olive oil and other oils or fats, compulsory indication on labels of the origin of olives – with origin being determined on the basis of the tree and the place of harvesting, and not the place of pressing and processing – and greater transparency in the inward-processing arrangements, in order to ensure that this mechanism cannot be used to brand and sell oils imported from non-Community countries as Community oils.

From this point of view, therefore, our proposal is consistent overall. I have examined other Member’s amendments. In brief, I support Amendment No 91 tabled by Mr Jové Peres, which seeks to maintain the ban on switching to other crops, as in the case where the Member States opt for the regionalisation of aid mechanism. Nevertheless, I do not support other amendments which have already been rejected by our committee when put to the vote.

Lastly, I would like to say, ladies and gentlemen of the European Parliament, that I have found Amendment No 87, tabled in committee by Mrs Redondo, in the proposed text to be put to the vote. It follows a logic which is, not just in my opinion, incompatible with the committee’s vote – and I am surprised to see it in the text before us – just as there is conflicting logic between this amendment and the products of most of the Member States. I trust that in the final vote we will be able to demonstrate the overall consistency of this opinion and thereby make Parliament’s credibility evident in its negotiations with the Council and the Commission.

>> Mayer, Xaver (PPE-DE ). – (DE) Mr President, Commissioner, ladies and gentlemen, it is indeed an exceptional occurrence to discuss hops in the middle of a group of Mediterranean products, and this is probably the reason why it was originally down for discussion at a different time. It is a small sector, but hops are undoubtedly a very important product to those who have anything to do with them; their significance is akin to that of hormones in human or animal processes or of catalysts in physical or chemical reactions.

Anyone who was unaware of the importance of hops, Mr President, could no longer remain so after enjoying, in moderation, the product for which it is used – the beer to which you referred before, the elixir of life. I believe that beer – consumed in moderation, of course, as I have already said – is also a healthy foodstuff; we Bavarians know that better than most, and you, as a Franconian,
are equally well aware of its qualities. Like wine, beer is a special product, and some people, including Mr Daul, the chairman of our Committee on Agriculture and Rural Development, also refer to it as Hopfentee, or ‘hop tea’.

I shall now confine myself to hops, Mr President, but my introductory remarks leave me in need of a little extra time. The common organisation of the market in hops has existed since 1971, and down through the years it has proved to be a flexible, simple and yet very efficient arrangement. Last year’s report from the Commission also laid particular emphasis on that point.

The aims and measures of the existing regime, however, namely hop production based on quality and response to market demand, coupled with a comprehensive proof-of-origin system, were ultimately made achievable primarily by vigorous producer groups. For this reason, I intend to restrict myself, in the short time at my disposal, to two points, the first being support, including future support, for producer groups; this is why, in the amendment, I have proposed the incorporation of an option whereby the retained component of up to 25% of the national ceiling may be paid to either producer groups or producers themselves.

My second point concerns the inclusion in the system of grubbed-up areas, which have helped to stabilise the market, and I emphasise that very strongly.

Fiori (PPE-DE). – (IT) Mr President, Commissioner Fischler, my personal opinions on the reports which we will be voting on tomorrow differ in certain cases, as does my personal judgment of the mid-term reform of the common agricultural policy. I have nevertheless accepted the compromise put forward by Mr Daul based on common sense, like a good agriculturist, because I consider it to be a well-balanced compromise. What I found hard to understand – knowing his abilities, both in technical and political terms – was, for example, the Commission’s proposal on tobacco, because the total decoupling system proposed would inevitably lead – and not just in my opinion but also according to important European universities – to the complete disappearance of production with the impact on employment which the rapporteur, Mr Berlato, pointed out earlier.

Moreover, I cannot understand why, unlike all the other production sectors for which specific production-related payments have been maintained, or where the Member States have been given the opportunity to implement partial forms of decoupling, the tobacco sector is the only one where the Commission has decided to apply total decoupling. Health reasons, among others, have been cited, ignoring the fact that dismantling the production of tobacco in Europe will not contribute in the slightest to combating smoking. On the contrary, the lack of European production would be immediately replaced by more imports from the rest of the world. Therefore, we used plenty of common sense in committee to maintain a common organisation of the market in tobacco capable of providing long-term prospects for development of the sector; we sought to achieve stability of the budget for the producers and to achieve equal treatment
of all the categories of producers in a new common organisation of the market consistent with the need for stability in the agriculture sector and with the continued production of tobacco in Europe, including for strategic reasons.

With regard to the olive oil industry, on the other hand, the reform proposed by the Commission can be broadly endorsed. In fact, although I do not agree with the decoupling system, as you well know, I think that this principle is acceptable for permanent tree-based cultivation such as olive growing, provided that it helps eliminate a significant amount of red tape regarding the support system and above all, enables us to apply measures concerning quality, traceability, conversion and promotion in order to encourage further development in quality terms. We also used our common sense with regard to the olive oil system; we have secured long-term financial support for farmers; we worked on the right to historical payment with reference to the average of payments paid to an individual producer as production aid during the reference period, and above all, we have introduced and pushed for financial intervention in support of quality products, traceability, market monitoring, the promotion and strengthening of producers’ organisations and specific environmental measures.

I believe that the proposal which Parliament and the Commission will put forward on olive oil will be highly beneficial for this sector and I hope, Commissioner, that you will accept the suggestions which Parliament’s Committee on Agriculture and Rural Development has provided on the tobacco sector.

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Procacci (ELDR). – (IT) Mr President, I will not repeat myself over tobacco, but I find it difficult to believe that Commissioner Fischler thinks that the Commission’s proposal on tobacco is dictated by health reasons. It is difficult to think this, and not to think instead that 500,000 jobs are being put in jeopardy in Europe. If there really were a link between the prevalence of smoking and the reduction or elimination of tobacco production, I would be the first in this Chamber to support the Commission’s proposal. There is no link, though. By adopting the proposal we would only be harming the citizens of the Union and the tobacco producers without making a real contribution to the fight against smoking. I would therefore call on the Commission to take into account this position, put forward by many quarters in this Chamber, both by political parties and by individual MEPs. I am obviously expressing my personal opinion, but I believe that it is widely shared in Parliament, something which we will be able to verify tomorrow in the vote.

With regard to the proposal on olive oil, however, I can say that the approach of the Commission’s proposal is fairly acceptable. The need for transparency, attention to the quality, environmental and social value of this product are considered in the Commission’s proposal and have been re-examined further in the opinion issued by Parliament’s Committee on Agriculture and Rural Development. The choice to make the decoupling percentage flexible, the possibility that the national States will have, I hope, to modify these
percentages, is a positive process of osmosis between the rigid rules of the Commission and the choices of the Member States, an intelligent decision which will allow the national governments to adopt the most appropriate options for the regions. The question of combating the mixing of oils remains unchanged and well-founded, in order to guarantee transparency and consumer protection, the fight against fraud, the scaling down of inward processing and the attainment of labelling which states and really enhances the place of production and not of processing. In this way, the monitoring agencies can continue to play a part.

I would just call on Commissioner Fischler to see that, following the vote in the Council, with Parliament’s opinion, the regulations which are adopted are consistent with the decisions, something which unfortunately we have not seen in the past.

Van den Berg (PSE). – (NL) Mr President, on Saturday, the day before Cancún's failure, the alliance of African countries and countries with the lowest incomes called it a day. They felt completely ignored, particularly by the United States, which supports the cotton farmers in South Carolina with no less than EUR 3.5 billion, whereas Europe supports its cotton sector with only EUR 800 million. As a result, the African cotton states feel very much threatened by this. Poverty is actively created in that way. The countries with the lowest incomes are right to stage a protest against this. This is substantiated by the resolution adopted in February during the ACP-EU Joint Parliamentary Assembly. In the same way that AIDS medicines symbolise the break-through in Doha, cotton symbolises the failure in Cancún.

Cotton aid in Europe forms part of agricultural policy that involves high subsidies for cereal, meat and milk. Previously, we Social Democrats have tried to start by decoupling production support by 50% and shifting towards rural policy, nature conservation and animal welfare, in other words, shifting from quantity to quality. The conservative lobby in this House, however, has put a spanner in the works. The Commission is now tabling a modest proposal to decouple by 60% and to channel a good chunk of those subsidies to rural development in the area concerned, but the majority in the European Parliament is hiding behind the US and behind uncertainty as to the outcome, and so pleads in favour of 20% decoupling. I can understand my Spanish fellow MEPs if they do not only want to deal with cotton, but also with cereal, meat and milk, but I regret that we are not acting more boldly and demonstrating that we have learnt the lesson of Cancún.

By weakening the Commission’s proposals, we are giving insufficient signals to those people around the world who want fair trade. Accordingly, a number of Social Democrats in this House will be voting against watering the proposals down. I hope that by doing so, we are sending a clear message to the Commission. I would urge the Commission to persevere.
Mr President, we are currently engaged in pursuing interim reform of the CAP. I shall not reiterate arguments I adduced in the past. Nonetheless, I would like to take this opportunity to restate my opposition to measures that would have a significant impact on the common agricultural policy.

Decoupling aid will result in reduced production. That much is clear. All economic activity in underprivileged areas or areas with natural disadvantages will suffer too. A two-tier land market will emerge because some of the land will be entitled to aid and the rest will not. This will fuel speculation. It will be even more difficult for young farmers to start out in life. Young farmers will require funds to purchase payment rights in addition to funds to purchase land.

All these developments will come at a critical stage in the hand over of agricultural holdings from one generation to another. The situation of the economy in general is precarious too, and the prospects for jobs bleak. There could be serious implications for the population of the areas in question.

The consequences will be most noticeable for crops in the disadvantaged areas or for crops involving the most variable costs in terms of intensity of labour. This is very much the case for the crops under discussion today. Cotton, tobacco and olive oil are all in this category.

I am aware of the mandate given by the Council of Ministers, although I do not endorse it. I cannot do so because of the drastic consequences it would have for extensive sensitive areas. Essentially, this policy is about using scant economic resources to attain certain objectives. To date, resources were allocated to these crops with clear objectives in mind. The question arises as to what the objectives of this proposal are. The risks involved are abundantly clear, however. Even the Commission itself has recognised them.

This proposal means abandoning a policy that had proved successful. The current COM for olive oil has resulted in substantial improvements in terms of quality and consumer safety. It also stimulated economic activity in depressed areas. Why should it be abandoned?

In the case of other cereal crops, the option of keeping a percentage of aid coupled to production has been retained. The circumstances of these crops are very different from those of olive oil. Surely similar arrangements for olive oil could be considered?

I would also like to mention the stance adopted by the Committee on Agriculture and Rural Development of the European Parliament. The only way of ensuring that what actually reaches the consumer is actually olive oil is to keep part of the aid coupled to production. The fact that all this has coincided with the proposal to stop financing control agencies is giving rise to concern. Even if the agencies survived, what instruments would they have at their disposal to guarantee the quality of the oil? Honest undertakings and ones
tempted to be dishonest can be found in any sphere of economic activity. I suggest that only the dishonest ones stand to gain from this Commission proposal.

Accordingly, I have tabled a series of amendments aimed at keeping 25% of aid coupled to production. I trust the House will support them.

Graefe zu Baringdorf (Verts/ALE). – (DE) Mr President, Commissioner, the discussion on decoupling is raging once again, this time in connection with these products of southern Europe, and it is conveying the impression that the money is to be taken from the farmers. On one occasion in committee I blew my top and made it clear that decoupling is actually a means of ensuring that the money remains with the farmers, especially in the case of tobacco. However, we must be aware that, in view of the fact that cotton prices cover only a third of production costs and tobacco prices cover only about half the cost of production, there is naturally a great danger that the absence of any compulsion to grow these products in order to qualify for the premium will result in other crops being grown instead. The main characteristic that distinguishes these products from the agricultural produce of northern Europe may well be that the production and processing of these Mediterranean crops involve more seasonal workers, who might lose their jobs in the event of a switch to other crops. The vital requirement, then, is to promote rural development and to rely on other products with a positive knock-on effect in terms of employment.

There is a need to persuade industry of the need to start paying decent prices at long last for agricultural products, which are, in some cases, only a minor ingredient of its end products.

Decoupling is the start of a wider debate on farm-gate prices – it applies to milk just as it applies to tobacco and cotton. This is about to become a burning issue. I must therefore say that I endorse the Commission’s proposals in principle and shall vote accordingly.

Queiró (UEN). – (PT) Mr President, in line with the basic principles for reforming the CAP, which was approved last June, common rules have been established for systems of direct aid for farmers. This proposal for a regulation consequently enshrines these principles for the olive oil, tobacco and cotton sectors and the proposal is examined by our fellow Member, Joseph Daul, whom I wish to congratulate on his work.

I shall focus, however, on the consequences of this proposal for Portugal. As regards olive oil, the Commission appears to be unaware of the planting of 30 000 hectares of new olive groves with the right to production aid that the Council authorised in 1998. In fact, Portugal has drawn up a programme for planting these 30 000 hectares, which will take place from 2000 to 2006, and its
implementation will run as set out in the programme.

This proposal for a revision that the Commission has submitted, however, has destroyed this programme along with the expectations created for producers. As regards tobacco, the Commission proposal to totally decouple aid will cause farmers to swiftly abandon this crop in Portugal. This abandoning of production will have extremely damaging effects not only on employment in farming but also on the processing industry. With regard to cotton, a sector which has expanded substantially in recent years, the Commission proposal penalises production by around 30% which, when taken together with the inadequacy of production-related aid, makes this crop rather unattractive and provides few opportunities to reconvert it.

Mr President, we are once again faced with a Commission proposal that fails to take account either of the specific characteristics of Portuguese farming and indeed of other regional forms of farming, or of the risks that farmers will desert farming altogether or of the unemployment-related social problems that go hand in hand with this process. This is once again unfairly penalising the income of our farmers and we cannot ...

(The President cut off the speaker)

Van Dam (EDD). – (NL) Mr President, decoupling support from production is said to give European agriculture a head start in the WTO negotiations, or so Commissioner Fischler always maintains. European agricultural policy has meanwhile been adapted, but the effects within the World Trade Organisation are still not visible. What is worse, other trading blocs do not seem to want to put an end to their trade-distorting support.

I am therefore on my guard when the Commission justifies the decoupling of cotton premiums by using the argument that the World Trade Organisation insists on it. From experience, we know that this argument is flawed. After all, the European Union accounts for not even 3% of the world's cotton production, while the European Union imports 48% of its cotton requirements duty-free. The claim that European government support is distorting the world market for cotton is very impudent indeed.

In that light, the reform of the cotton sector is not so much needed from the point of view of the World Trade Organisation, as it is with a view to a lively countryside. This reform must focus on improving the quality and, where possible, maintaining employment in this sector. Agricultural subsidies, however, should not be used as a kind of structural fund. It is important for the financial impact of reform to be closely monitored and to intervene in good time, where necessary.

Support to the tobacco sector is of an order that is entirely different from that for the production of cotton. The summit of Gothenburg's decision to reduce the
support for tobacco production was the right one. Unlike cotton, tobacco is not simply an agricultural product. Its use is carcinogenic and leads to heart and vascular diseases in many people. Given that on the one hand, in the Committee on the Environment, Public Health and Consumer Policy, we talk about the health risks of minimal residual values of pesticides on our food, it is then absurd on the other hand, to spend EUR 1 billion annually on the production of tobacco. In my view, decoupling, alternative crops and modulation for the benefit of rural development cannot be introduced quickly enough in this sector.

Souchet (NI). – (FR) Mr President, Commissioner Fischler, the proposal for the reform of the COM in tobacco presented by the European Commission is based on a mistaken assumption. The Commission intends to make the total abolition of public aid to European tobacco producers a key element in the anti-smoking campaign. The link would, perhaps, deserve to be examined if Europe completely dominated the market and produced 95% of world tobacco, but that is far from being the case: Europe produces only 5% of world tobacco and its production covers less than 30% of its needs.

Furthermore, as the FAO – which specialises in the subject – has emphasised, a public policy that seeks to reduce excessive consumption of tobacco must focus on behaviour rather than on the product, on demand rather than on supply. Advisedly, it must inform and prohibit. Let me quote our rapporteur, though: if ‘smoking and also the production and sale of products derived from tobacco growing continue to be legal, it is obvious that the only outcome of the Commission proposal will be that the tobacco-product industries will seek their supplies from outside the EU’. It follows that undertaking, as the Commission is doing, to make European production disappear at a time when the European consumer market remains a very important and growing one, is like offering the whole of this market on a plate to our competitors, to non-European tobacco producers. That is what Brazil, where production is exploding, is waiting for.

Nevertheless, the tobacco-product industries stress the essential role played by the types of tobacco cultivated in Europe in their blends. European producers specialise primarily in varieties that are fairly neutral in terms of aroma, but with a very low level of alkaloid. I am thinking, for example, about Virginie de Vendée from Poitou-Charentes, in the Loire Atlantique. It is tobacco cultivated in Europe that allows European cigarette manufacturers to comply with the ever more stringent health regulations that we impose on them in terms of nicotine or tar level. If we deprive them of this perfectly planned source, where will our manufacturers go to stock up? To South-East Asia? What would be the benefit in terms of public health? Let us take care to ensure that the disappearance of production does not entail, in this sector as in many others, delocalisation and transformation. Already, Altadis is closing sites in France and is setting up in Morocco. Is this the evolution that the Commission wants to become the rule?

The Commission has not taken into consideration the socio-economic impact or the consequences for land-use planning of the measures that it proposes. It is a
case, however, of very localised production, in often sensitive regions where it is not always possible to replace production. It is an activity that creates several jobs, permanent and seasonal. Now, the reform as it has been proposed can only end in the complete abandon of the tobacco growing in all production areas and therefore leads to unemployment there.

We must reject this reform and reject its logic, that of pure, simple and discriminatory eradication of production, of Community tobacco production, and we must reject its ideological, moralistic and simplistic inspiration. The counter-proposal by our Committee on Agriculture and Rural Development is undeniably better. Certainly, it is part of the logic of the decoupling that the Commission wants, but it strives to limit the maximum size and the negative effects. Recoupling aid up to 70% of current support will not make it possible to avoid a drop in production, but it will restrict the extent of it. The farmer is free both to continue production – which the Commission proposal did not allow – and to think about restructuring without endangering the balance of his farm. Foresight is given to tobacco planters, the proposal from the Committee on Agriculture is within the budgetary framework of the entire CAP as has been set until 2013. The illusory reference to the second pillar proposed by the Commission has clearly and fortunately been rejected. The system using quantity of production that led to producers being treated differently and overly complicated the system has been wisely abandoned.

Maximum recoupling, major subsidiarity left to Member States to apply the regulation according to the situation in individual countries and reliance on groups of producers, is a real alternative, that the Committee on Agriculture is proposing in order to maintain cultivation in Europe whilst the consumer market is there. It is the right direction and we support it.

Redondo Jimenez (PPE-DE). – (ES) Mr President, Commissioner, olive oil is one of the healthiest foodstuffs produced. It is a product enjoying a growing market, precisely because consumers are increasingly mindful of their health. Surpluses are certainly not a problem for this sector. Indeed, the latter is currently driving forward progress in extensive regions located in the Mediterranean countries. It would be difficult to grow other crops on the land concerned. Consequently, all this is very much in line with the hoped-for economic dynamism identified as an objective at various summits of Heads of State or Government. Consequently, there is no valid reason to curtail the development of this sector.

Nonetheless, the draft reform on the table before the Council of Ministers for Agriculture Ministers contains only a cursory reference to the condition of the sector. The scant attention paid to the difficulties mentioned by several countries merits particular criticism. My own home country, Spain, was one of those disregarded, despite being the greatest producer of olive oil in the European Union and indeed in the world.
In response to a number of questions in Parliament and even today, the European Commission has admitted that 23% of the olive trees in Spain would cease to receive Community aid. According to data provided by Commissioner Fischler, 66 million of the 288 million olive trees planted before May 1988 will not come into production within the reference period used to calculate decoupled aid, namely 2000-2002. The Commission feels that this deficit can be dealt with by drawing on the national reserve of rights to aid to be set up following the reform of the CAP agreed in September 2003. This reserve will be composed of 3% of the decoupled rights. It is worth stating, however, that the reserve will be used not only for this particular purpose but also to deal with other potential shortfalls in any one of the sectors reformed. I therefore suggest the cake in question is far too small for each of the many guests likely to turn up at the party to be able to enjoy a reasonable slice.

The European Commission has also failed to take account of the inadequate quota allocated to Spain in 1998. Commissioner Fischler gave confirmation of this before the House today. In spite of the adjustment agreed in that year, a political agreement was reached. This was clearly enshrined in the recitals of the COM Regulation, providing for review of national quotas, once reliable data on the situation of the sector was available to the Member States. Such data is now available. It has been on the table for some time, thanks to studies conducted under the auspices of the Commission itself. The studies make it quite clear that the quota allocated to Spain falls far short of actual production.

Producers should not lose out through reform of the olive oil sector. They have made a great effort to improve their marketing in recent years. Provision should also be made for olive groves located in marginal regions of the European Union. These groves play an important socio-economic and environmental role in such regions. The 1998 groves that have not come into production during the reference period should not be overlooked either.

Reform of the sector should include an appropriate degree of flexibility to allow each of the producer countries to deal with its own specific situation.

Further, along with the other Mediterranean sectors debated in the House today, the olive oil sector must enjoy the same preferential status accorded to all other reformed agricultural sectors. Producer countries should therefore be allowed to designate a transitional period before the new reforms come into force.

All these suggestions are contained in the proposal tabled by the Committee on Agriculture and Rural Development. This is a consensus proposal and it has enabled us all to move forward. I should like to thank Mr Daul, Mr Mayer, Mr Lavarra and Mr Berlato. There is no cause for concern, Amendment No 87 was adopted and should appear in the consolidated text. In addition, I would ask Mr Cercas to convey to ...
Izquierdo Rojo (PSE). – (ES) Mr President, it took a hard struggle to reach a compromise within the Committee on Agriculture and Rural Development. Opposing viewpoints had to be reconciled. I believe this is a valuable compromise. It represents a useful reference point facilitating full implementation of CAP reform. At the same time, it reduces the risk of agricultural production being discontinued in disadvantaged areas. I shall therefore be voting in favour of this compromise and I feel the Commission should accept it.

As regards the Commission, I think measures should be taken to ensure the Spanish financial statement does not suffer because actual production was not represented accurately. Mrs Redondo was quite right to make this point earlier.

Secondly, Commissioner, cessation of tobacco production in Granada should be deferred until the individuals involved can be offered genuine alternative jobs in agriculture.

The Spanish Popular Party has already closed down CETARSA for reasons connected with financial speculation. CETARSA was a profitable public company. I beg you, Commissioner, not to now give the region the coup de grâce through your proposal, which would turn the 2 000 families dependent on tobacco off the land.

Vallvé (ELDR). – (ES) Mr President, Commissioner, we are concerned with the interim reform of the CAP for three major sectors that are particularly important to the Mediterranean area. I shall focus on olive oil.

In this regard, the proposal contains an unequivocal reference to the need to maintain the farmers’ quality of life and standard of living. It also refers to the need to combat fraud and guarantee a high quality product.

I should like to point out that there is a considerable difference in the production of olive oil, depending on the area concerned. The yield can vary between 200 kg and 400 kg per hectare in some regions to over 800 kg per hectare in others. Consequently, aid should not be restricted solely to aid for production.

Commissioner, there has been frequent mention of the multi-functional role of agriculture. Olive oil production is no exception. In disadvantaged areas, it enables farmers to enjoy a reasonable standard of living. It ensures that the population stays on the land. These areas would otherwise suffer from depopulation and all the ensuing problems. Decoupling could provide a further incentive.

In my view, Member States should be able to offer all olive oil producers assurance and security on the basis of the hectares under cultivation, regardless of the amount of oil produced.
Mr President, most farmers in Portugal are worried at these Commission proposals on reforming the common organisation of the markets in Mediterranean produce such as oil, tobacco and cotton. These are bad proposals, both because they uphold the discrimination against specifically Mediterranean produce, which has always received poor treatment at the hands of the CAP, and also because they provide an incentive for farmers to abandon production, by decoupling aid and by failing to increase the appropriations and mechanisms to regulate the market, which would enable us to remedy any potential injustices in the distribution of aid amongst countries, amongst forms of production and amongst producers.

As a matter of fact, the stated objective of last July’s CAP reform is to make budgetary savings, more specifically of EUR 113 million in annual savings by 2013, and also to ensure the liberalisation of farming in the WTO negotiations. This is an unacceptable position.

The vast majority of Mediterranean production is located in the cohesion countries and in the least-favoured regions, and is extremely labour-intensive. I am talking about olive and tobacco farming for example, and these are often the main source of income in these regions. They therefore deserve fair treatment from the Commission.

It is unacceptable that no account is taken of the social and environmental consequences, particularly in mountainous regions and in other least-favoured areas, as is the case in Portugal, where very few alternatives to these crops of olive oil, tobacco and cotton exist and where the production of fruits, vegetables and wines is experiencing serious difficulties. It is unacceptable that the Commission takes no account of the specific characteristics of Portugal’s situation, or even of the 1998 decision approving the planting of 30 000 new hectares of olive groves with the right to aid for modernising the sector. It is unacceptable that refunds for olive oil used in preserves should be brought to an end and national monitoring agencies closed down, insisting on a policy that undermines the quality of oil, by not banning the blending of olive oil with other vegetable oils and by allowing misleading labelling for products that are not genuinely oil. Equally serious is the Commission’s proposal for the tobacco sector, which loses part of its current aid in conditions that jeopardise the continuity of production and industry, resulting in unemployment and an increase in exports from outside the Union. The situation of cotton is also unacceptable because the amount of land eligible for aid is set at a derisory 360 hectares.

Mr President, my home country and especially my group, have a particular difficulty with the way olive oil is dealt with in the proposal by the Committee on Agriculture and Rural Development. This is because there are significant differences between the sums received per hectare in different olive oil producing areas. For instance, some areas of Spain
receive EUR 720 per hectare, whereas other provinces receive EUR 156. That is a difference of almost 500%. How can these regions ever be expected to compete with each other? There is another paradox involved too. The most productive and profitable areas are those belonging to industrial owners, large multinationals, major landowners and producers. The situation beggars belief. To draw a comparison with the retail trade, it is as if we were helping large department stores such as El Corte Inglés or Carrefour and penalising small traders. I am sure you will agree that would not make sense. Well, let me tell you that nonetheless, it is actually happening. It is part of daily life out in the real world.

We believe the situation has to change. Small producers and family holdings must be helped, to ensure people remain on their ancestral land. If they were to leave, we would be faced with depopulation and all its ensuing problems. Ladies and gentlemen, if we do not succeed in encouraging these people to stay on the land, there will be a heavy price to pay for our failure.

Angelilli (UEN). – (IT) Mr President, adoption of the report tomorrow can constitute a clear, positive signal with regard to the partial decoupling method, a solution which would avoid dismantling, in an extremely short space of time, the production of tobacco in Europe, thereby safeguarding 500 000 jobs of which 135 000 are in Italy alone. Adoption of this text would also enable a new stage of negotiations to get underway in the Council and with regard to the Commission, so that the demands of the producers in this sector can be met in full.

First of all, it would be desirable to reconsider the conditions of eligibility for decoupled aid by calculating it, apart from on the basis of the three-yearly historical average, also on the basis of further quotas which the producer has obtained since 1 January 2001. Future negotiations would also enable the precise recipients of restructuring and conversion resources to be identified. Firstly, the aid should clearly target tobacco-producing holdings; secondly, aid should be distributed by producers’ associations and earmarked, only then for the regions.

I would conclude by calling on President Prodi, having taken note of Parliament’s opinion, which we hope will be favourable tomorrow, to steer the forthcoming new mandate of the European Commission in this direction.

Ayuso González (PPE-DE). – (ES) Mr President, Commissioner, ladies and gentlemen, with regard to cotton and tobacco, I am bound to begin with a reference to these proposals by the Commission. A quick reaction to them would be that their objective is simply to ensure cultivation of both these crops is discontinued. The implication seems to be that the whole sector is expendable, along with the thousands of agricultural workers involved who reside in the most disadvantaged areas of southern Europe. In addition, the fact
that in the Acts of Accession of Spain and Greece the Member States undertook to protect cotton production in those two countries has been completely disregarded.

Due to the penalties imposed pursuant to the 2001 cotton reform, the area under cotton in Spain has already suffered a 20% reduction. Further, it does not make sense to use cotton as a bargaining counter in WTO negotiations with third countries, as the Commission would like to do. After all, the European Union only accounts for 2.5% of world production. In addition, at global level exports are dominated by the United States, whereas the Union accounts for a mere 1.5%. This is not therefore a valid argument for reducing aid to cotton.

The further reform proposed amounts to an additional turn of the screw. The very survival of the crop is now under threat. The proposals for both cotton and tobacco will also cause serious large-scale damage to the entire socio-economic structure based on these crops. I can provide some specific instances drawn from Spain. The cotton picking and ginning industry represents 2 000 jobs. A further million jobs are directly linked to the sector. There are also 600 motorised harvesting machines used exclusively to gather cotton. They would all have to be scrapped. The situation is even more serious in the case of tobacco. Tobacco production involves up to 2 200 hours of work per hectare. I shall take the town of Talayuela in the Extremadura region of western Spain as an example. It is the leading producer of tobacco in Spain. Five thousand of its 10 000 inhabitants are employed in the tobacco industry. The livelihoods of over 20 000 families depend on tobacco in Extremadura alone.

It has to be said that the report adopted by the Committee on Agriculture and Rural Development does substantially reduce the level of decoupling of aid proposed by the European Commission. It goes some way towards lifting the threat to the survival of the crops. It is vitally important for the House to support this report. That will send a clear message to the Council of Ministers, namely that Parliament is in favour of retaining these particular sectors that generate so many jobs in disadvantaged areas.

Adam (PSE). – Mr President, last year, despite opposition from governments and farming organisations and a lukewarm response from this Parliament, a fundamental reform was agreed for the common agricultural policy. This will eventually totally disconnect payments to farmers from production.

We are now dealing with cotton, tobacco, hops, and olive oil which are all products with regional sensitivities. The Commission proposals are something of a step backwards from the reforms of last year with the exception of hops. However, the Daul and Lavarra reports attempt to resist meaningful reform in cotton and tobacco and, to an extent, in olive oil. Only in the amendments which set a minimum of 60% decoupling for olive oil does the committee move closer to the reform package of last year.
I fully understand the difficulties in these sectors and respect the work of the rapporteurs but in the longer term the rural economies which are affected by decoupling are best helped by development measures which can be targeted more directly and effectively. This is the approach for different products which is being applied in parts of my own region.

I wish the Commission had been bolder in its original proposals, but I am prepared to support them. However, for the reasons given, I cannot support these two reports as they stand and my final vote will depend on which amendments are adopted.

Sbarbati (ELDR). – (IT) Mr President, Commissioner Fischler, I will not repeat what my fellow Member, Mr Lavarra has already said – because I fully agree with his report on olive oil – but I wanted to say a few things about the question of tobacco. I also wanted to point out to the Commissioner that not only is there a problem concerning the depressed areas of the Mediterranean, a problem regarding monoculture where it is difficult to recover and convert the land, but also and above all a problem of social cohesion, in addition to the problem of ancillary activities and consequently the loss of thousands of jobs which endangers precisely the social stability of this reality. Therefore, while the issue of agriculture – in particular the CAP issue – also must be considered from a political viewpoint – just as we want Europe to do with respect to all the decisive issues for its development – it must be said that we have to make an effort, Commissioner, more of an effort to salvage something with regard to Mediterranean crops, since too much is done in favour of mainland agriculture, for France and Germany. It is a problem. No one says it, perhaps no one is brave enough, but someone has to say it and so I am defending Mediterranean crops; the health-conscious approach which is being propounded here is totally hypocritical: if we no longer use Kentucky tobacco, which is a healthy leaf, we will go and get our tobacco from Turkey, where the leaves are not healthy because they are contaminated by pesticides. As a consequence, citizens’ health will be put at risk and the States will not ban smoking, as they will continue to receive excise duties.

Patakis (GUE/NGL). – (EL) Mr President, the order being given by the European Commission with the proposal for a regulation on Mediterranean products, despite efforts to embellish and enhance the situation, is categorical and depressing: the disappearance of tobacco crops, a reduction in cotton crops and the abolition of olive crops.

Unfortunately, the report by the European Parliament, apart from a few improvements to the letter, has also been drafted entirely in the spirit of the Commission proposal, which should hardly even constitute the basis for debate in the European Parliament. It should have been and it should be rejected in its entirety, because it is far worse than the current situation. The gradual decoupling of subsidies from agricultural production and their conversion to
Community charity completely subjugates small- and medium-sized farmers to the interests of big business and the food industry multinationals, which will also make full use of the WTO agreements to buy agricultural products at knock-down prices.

It is crystal clear that small- and medium-sized farmers will receive far less money in compensation for the abolition of basic crops such as tobacco, cotton and oil. A large proportion of subsidies will shift to the second pillar, with the basic recipients being big business, in which small- and medium-sized farmers will earn some sort of daily wage as service personnel.

All this relates to products in most of which the European Union has an acute deficit and which it imports in massive quantities. All this is happening without any social, development or environmental criteria, with complete indifference to the painful consequences which it will have not only for the agricultural sector, but also for the economy connected to it in areas with acute social and economic problems.

For us, these proposals do not admit of any amendment or embellishment. We are calling for them to be voted out and withdrawn. For us, there is no question of partial, comparatively partial or complete decoupling, or of a comparative or superlative degree of extermination of small- and medium-sized agriculture in the South. That is why, if they are not withdrawn, they will come up against the fighting ...

(The President cut off the speaker)

Santini (PPE-DE). – (IT) Mr President, I join my fellow Members in their criticisms of the Commission’s proposal for tobacco, but I will also try to explain why I am rejecting it with regard to the reasons set out in its favour. One female Member even referred to savings for the Community agriculture budget but it will have quite the opposite effect, since European manufacturers will have to buy tobacco from third countries leading to increased costs, lower employment and larger deficits of the Community trade budget. The conversion idea, already rejected by many, including here, and which I do not support either, might be a possible solution for other crops, but certainly is not for tobacco. There are no suitable, economical alternatives because tobacco is grown on small holdings. The possible crops are Mediterranean ones, which are already ring-fenced by Community production quotas and bans. In support of tobacco, though, is its highly cost-effective production. An hour’s work on tobacco costs the Community budget EUR 5.7. To give a comparison with other crops, durum wheat costs EUR 21.4 and corn costs EUR 12.8.

The fight against cancer really is an untenable reason. Indeed, the possible elimination of European tobacco in order to contribute to the fight against cancer is totally irrelevant. Moreover, already today, as has been pointed out,
80% of the tobacco consumed in Europe is imported.

On the other hand, the Commission has been more sensible with regard to olive oil. The proposal it has tabled in this regard is undoubtedly acceptable, especially if it is perfected by maintaining the commitment to give the Member States broad leeway to decide the extent of decoupling, which in any case is already acceptable as the 60/40 ratio determined by the committee. And the States must be given other opportunities to intervene in terms of quality too.

McNally (PSE ). – Mr President, Mrs Stihler is unwell and is unable to be attend. I hope you will forgive me for taking 30 seconds of her time.

Mr Fischler said in his presentation that these reforms were based on the same principles as earlier reform. That is so, but they are considerably less ambitious in their scope, even in the Commission's proposals. He also said that the aims were identical, in that one of the aims was sustainability. He presumably means economic, environmental and social sustainability, competitiveness and compatibility with the WTO, since we must not look at agricultural issues in a vacuum. It is just one of the EU's policies and there are others – those concerned with world trade – that must influence our thinking, as must enlargement and its implications.

We are talking about the poorest regions, in some cases, of some of the poorer countries in the EU. That is quite clear and presumably explains the less ambitious proposals. The budget may be neutral, but there are differential consequences for farm workers and farm owners, which is one of the problems the PSE Group has with these suggestions. As a whole, we are strong supporters of reform. We are perfectly well aware that the old regime is untenable for very much longer and that decoupling will come, and we are aware of WTO obligations. However, we are also aware of the social consequences and have misgivings that the Commission has not sufficiently borne those consequences in mind. More consideration should be given to the fate of workers who are working for employers in the farming industry.

There can be no doubt that Parliament's proposals will not help in the Doha development round. They will – mistakenly, perhaps, but certainly – be seen as non-reform and as a move away from what is expected by the poorest countries in the world. That is absolutely clear and as a member of the Committee on Industry, External Trade, Research and Energy, it is something I have to emphasise while supporting the overall PSE position.

Virrankoski (ELDR ). – (FI) Mr President, the reports under discussion concern extending agricultural reform to olive, cotton and tobacco production. The key issue is the same as with the other reforms: the de-coupling of support and production. The de-coupling of support and production will probably appeal in particular to those opposed to tobacco cultivation. Under the single payment
scheme, over EUR 6 000 per hectare would be paid; in other words, the aid would be received even if no tobacco were produced at all. In this way the EU would be vigorously supporting the abandonment of its cultivation and a switch to some other form of production or set-aside measures. This is part of the agricultural reform. It is the biggest of its kind in the history of the EU.

As the reform is to begin next year, it is important that its implementation does not jeopardise the levels of income of private farmers. The reform will be very difficult to apply in practice as farms vary in different parts of the EU, as do the conditions of their management. If the period 2000-2002 is to be regarded as the reference period, five years will see changes in ownership, as well as the area farms cover, lines of production and investment. That is why there is the danger that there will be drastic and unjust changes in aid to farms. Commissioner Fischler, it was not for nothing that you pointed this out in your letters to the Ministers for Agriculture.

The other problem is the approval of society. Agricultural subsidies have long been seen as compensation for farmers producing at less than the costs of production. Will the taxpayer agree to aid being paid even if nothing is produced?

Fischler, Commission . (DE) Mr President, ladies and gentlemen, I have listened attentively to the contributions to this debate, and I should like to express my sincere thanks for what was certainly a very lively, if in some areas highly critical, discussion.

Let me deal, in the light of the debate, with the tabled amendments, beginning with the multisectoral amendments and decoupling. The flexibility proposed in Amendments Nos 17 and 57, which would enable the Governments of the Member States to set any rate they wish in excess of 60% for decoupled payments in respect of olive oil, is something I can support in principle. Amendments Nos 1, 5, 10, 11, 45, 81 and 83 call for an increase in production-linked aid for cotton-growers to 80%, and Amendment No 44 links aid to an obligation relating to the cotton harvest. I regret that I must reject all of these amendments, because they are inconsistent with the aim of significantly loosening the link between production volumes and aid.

Amendments Nos 26, 63, 67, 68 and 85, which relate to tobacco, call for 70% of aid to tobacco producers to remain linked to production. This is in stark contrast with the tone of the debate conducted by the Heads of Government at the Gothenburg Summit. For this reason I must uphold the Commission’s original proposal, which provides for the inclusion of all tobacco aid in the single-payment scheme.

Some amendments also call for an option to postpone the reforms in respect of olive oil, cotton and tobacco – these are Amendments Nos 7, 8, 24, 43, 74, 76,
Let me now move on to the individual sectors, beginning with olive oil. You have made a number of interesting suggestions here, which I believe are well worth examining, but I should find it difficult to agree to them in the proposed form. One such example is the proposal in Amendment No 58 that Member States be given the option of regionalising their national ceilings, which can certainly be considered. Care must be taken to ensure, however, that such an option does not result in excessive deviations from the average aid payments made to a region during the reference period.

I also believe that the suggestions made in Amendment No 84 are interesting. This amendment seeks to extend the reference period for individual holdings in order to ascertain the amount of the single payment and eligibility for aid in cases where the olive groves had not yet started producing during the reference period. This must not, however, lead to an increase in the total amount of support paid to olive-growers by each Member State.

I can accept the proposal in this amendment that the ceiling for fully decoupled payments be raised to 0.5 hectares of olive groves as measured by the geographic information system. For the sake of greater flexibility, however, we shall also increase the number of trees that must be preserved in the groves for which additional aid is paid.

Lastly, I am also prepared to consider an adjustment to the Council’s Annex IV with a view to ensuring that olive groves are cultivated in accordance with good farming and environmental practice. I am also in favour of quality improvements and support for young olive-growers, but I have serious doubts about the proposals contained in Amendments Nos 16, 21, 22, 52, 56, 60 and 61. The matters addressed in these amendments seem to me to be adequately regulated elsewhere.

Finally, I can also accept Amendment No 20 and parts of Amendments Nos 17, 54, 55, 58 and 84 in the Daul report. I regret to say that I must reject all the remaining amendments in Mr Daul’s report.

Now a few remarks on the Lavarra report. One of the points you have made, Mr Lavarra, is that you do not believe it should be permissible to produce mixtures of olive oil and other vegetable oils. I must tell you, however, that this would lead to less olive oil being marketed in Europe. What matters in my view is that these mixed oils are appropriately labelled so that consumers are not misled.

In connection with proposals made in the Lavarra report, I should like to emphasise that the Commission has certain instruments which enable it to intervene if the market situation so demands, particularly with regard to imports. Some of the amendments proposed in this report relate to the automatic
activation of the system of aid for private storage. Such a mechanism, however, would be contrary to the rationale and purpose of this system, which is supposed to enable us to cope with crises, and so I cannot endorse this type of amendment.

I do, however, agree with the idea that we should promote the quality of olive oil. On the other hand, I see no point in altering the harmonised provisions that were only recently adopted as part of the agreed quality strategy. Moreover, Community grants for quality programmes can be funded from the support programmes for rural areas.

On the question of controls, may I also point out that monitoring is not the task of the producer organisations but of the Member State and its public authorities.

And so to cotton. I agree that the current support regime for cotton is a highly specific scheme and that it is based in part on Acts of Accession. For this reason I can accept Amendment No 6, but at the same time I should like to mention that the Commission’s proposal adequately serves the purpose of supporting cotton production in those regions of the Community where cotton-growing is an important part of the agricultural structure. Most of the amendments would have resulted in a rise in cotton production, thereby increasing the overall budget by about EUR 50 million; this would be in breach of the Luxembourg Decision of June 2003, which prescribes that reforms must not entail an increase in the present budget. For this reason, I cannot consent to these amendments.

Amendments Nos 9, 37 and 70 are targeted against the transfer of funds to rural development. This transfer, however, is essential if the rural economies of cotton-producing regions are to be restructured and the necessary adjustments made. For this reason, I cannot accept these amendments either.

As far as producer associations are concerned, I believe that exclusion of the processing industry, with its own particular interests, is certainly not the best way to develop a quality policy for cotton. Accordingly, although I cannot accept the relevant amendments, I am prepared to give producer organisations a sufficiently active role in shaping the future of the cotton sector. I regret that I must reject all the remaining amendments in the Daul report that relate to cotton.

The main thrust of the amendments proposed for the tobacco sector is the preservation of the status quo, whereas the Commission is aiming for profound change. I must remind the House that even the extension of the premium scheme for the years 2002 to 2004 was only possible because the Commission undertook to reform the sector. If we do not reform the tobacco sector, there will, as I have said, be no more premiums at all after 2004 – and that in a situation in which the market price covers an average of only 20% of the cost of tobacco production.

As Mr Graefe zu Baringdorf pointed out, the proposal offers a solution with no
net budgetary impact. The difference is not that farmers are no longer receiving support but that they are no longer compelled to grow tobacco. That is the issue here. I might remind you that it was said at the Gothenburg Summit, in the context of discussions on sustainable development, that only healthy products are to be supported in the framework of Community policies.

Amendment No 66 proposes a buy-back programme. I cannot endorse this amendment, because the Commission is convinced that there is no need for such a programme. Producers who decide to turn their backs on farming can transfer their grant entitlements under Article 46 of the Regulation on direct support schemes.

Another amendment to which I cannot agree is Amendment No 69, the effect of which would be the premature abolition of the contribution to the Community Tobacco Fund. These contributions serve to finance measures that are designed to foster public awareness of the harmful effects of tobacco consumption and should, for consistency’s sake, be preserved for as long as production-linked aid is still available to tobacco-growers.

For the financing of the restructuring process, it is absolutely imperative that budgetary funds be transferred from subheading 1a to 1b. This transfer will enable the Member States to take appropriate measures to facilitate the redevelopment of tobacco-growing regions as part of the programmes for the development of rural areas.

Amendments Nos 27 and 38 propose that monies generated by modulation be used to fund specific measures taken by the Member States in areas where tobacco production accounts for at least 20% of the gross marketable output of industrial crops. The Commission is convinced that there is no need for specific measures of this type, because the funds generated by modulation will be available to all sectors in the form of additional support for rural-development measures.

The Commission can approve Amendment No 62 but must reject all the other amendments relating to tobacco.

Let me turn, finally, to hops. The Daul report is consistent with the main principles of the proposal with regard to hops. Under the first part of Amendment No 42 and Amendments Nos 82 and 86, farmers who have discontinued hop production and have received grubbing-up aid during the reference period would still be entitled to the direct payment. During the same period, however, these farmers would have been able to grow crops other than those for which aid was payable. In the calculation of the reference amount, in other words, no account would be taken of the grubbing-up aid. Accordingly, the Commission is unable to endorse these amendments.

Amendments Nos 35 and 36 and the second part of Amendment No 42 relate to support for the activities of producer organisations. It will naturally be possible
to form producer organisations in the future, and the Commission believes there must therefore be an appropriate means of ensuring that these organisations have access to funding.

President. Thank you, Commissioner Fischler.

The vote will take place tomorrow at 12 noon. (1)

(The sitting was closed at 11.13 p.m.)

(1) Agenda for next sitting: see Minutes

Annex – Position of the Commission

Paulsen report (A5 00449-2003):

The Commission can accept the following amendments wholly or partly and subject to rewording: 1, 2, 3, 5, 8, 9, 10, 11, 15, 20, 21 (1st part), 23, 24, 25, 26, 27, 28, 29, 31, 32, 33, 35, 38, 40, 42, 43, 44, 45, 46, 48, 49, 50, 51 (1st part), 52, 55, 56, 57, 58, 60, 62 (1st and 3rd part), 63, 65, 66, 68 (2nd part), 70 (1st part), 71, 75 and 79.

With regard to Amendment No 76, the Commission considers that the use of penal sanctions would be an important strengthening of controls on food and feed operators. The Commission refutes the Parliament's and Council's view that Article 55(2) and (3) relate to the third pillar. On the other hand it notes that this issue has already been submitted to the Court of Justice for determination (in another case). In these circumstances and taking into account the overall political context of this procedure, the Commission is prepared to withdraw Article 55(2) and (3) of this current proposal awaiting the Court's determination of this issue and reserves the right to propose again measures providing for criminal sanctions in this field.

The Commission cannot accept the following amendments: 4, 6, 7, 12, 13, 14, 17, 18, 21 (2nd part), 22, 30, 34, 37, 39, 41, 47, 51 (2nd part), 53, 54, 59, 61, 62 (2nd part), 64, 67, 68 (1st part), 69, 70 (2nd part), 72, 73, 74, 77 or 78.

Last updated: 10 August 2004
Intellectual property


(Codecision procedure: first reading)

The European Parliament,

– having regard to the Commission proposal to the European Parliament and the Council (COM(2003) 46)¹,

– having regard to Articles 251(2) and 95 of the EC Treaty, pursuant to which the Commission submitted the proposal to Parliament (C5-0055/2003),

– having regard to Rule 67 of its Rules of Procedure,

– having regard to the report of the Committee on Legal Affairs and the Internal Market and the opinion of the Committee on Industry, External Trade, Research and Energy (A5-0468/2003),

1. Approves the Commission proposal as amended;

2. Calls on the Commission to refer the matter to Parliament again if it intends to amend the proposal substantially or replace it with another text;

3. Instructs its President to forward its position to the Council and Commission.

¹ Not yet published in OJ.

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 95 thereof,

Having regard to the proposal from the Commission,

Having regard to the Opinion of the European Economic and Social Committee ¹,

After consulting the Committee of the Regions,

Acting in accordance with the procedure laid down in Article 251 of the Treaty ²,

¹ OJ C 32, 5.2.2004, p. 15.
Whereas:

(1) The achievement of the Internal Market entails eliminating restrictions on freedom of movement and distortions of competition, while creating an environment conducive to innovation and investment. In this context, the protection of intellectual property is an essential element for the success of the Internal Market. The protection of intellectual property is important not only for promoting innovation and creativity, but also for developing employment and improving competitiveness.

(2) The protection of intellectual property should allow the inventor or creator to derive a legitimate profit from his invention or creation. It should also allow the widest possible dissemination of works, ideas and new know-how. At the same time, it should not hamper freedom of expression, the free movement of information, or the protection of personal data, including on the Internet.

(3) However, without effective means of enforcing intellectual property rights, innovation and creativity are discouraged and investment diminished. It is therefore necessary to ensure that the substantive law on intellectual property, which is nowadays largely part of the acquis communautaire, is applied effectively in the Community. In this respect, the means of enforcing intellectual property rights are of paramount importance for the success of the Internal Market.
(4) At international level, all Member States, as well as the Community itself as regards matters within its competence, are bound by the Agreement on Trade-Related Aspects of Intellectual Property (the "TRIPS Agreement"), approved, as part of the multilateral negotiations of the Uruguay Round, by Council Decision 94/800/EC and concluded in the framework of the World Trade Organisation.

(5) The TRIPS Agreement contains, in particular, provisions on the means of enforcing intellectual property rights, which are common standards applicable at international level and implemented in all Member States. This Directive should not affect Member States' international obligations, including those under the TRIPS Agreement.

(6) There are also international conventions to which all Member States are parties and which also contain provisions on the means of enforcing intellectual property rights. These include, in particular, the Paris Convention for the Protection of Industrial Property, the Berne Convention for the Protection of Literary and Artistic Works, and the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations.

(7) It emerges from the consultations held by the Commission on this question that, in the Member States, and despite the TRIPS Agreement, there are still major disparities as regards the means of enforcing intellectual property rights. For instance, the arrangements for applying provisional measures, which are used in particular to preserve evidence, the calculation of damages, or the arrangements for applying injunctions, vary widely from one Member State to another. In some Member States, there are no measures, procedures and remedies such as the right of information and the recall, at the infringer's expense, of the infringing goods placed on the market.

(8) The disparities between the systems of the Member States as regards the means of enforcing intellectual property rights are prejudicial to the proper functioning of the Internal Market and make it impossible to ensure that intellectual property rights enjoy an equivalent level of protection throughout the Community. This situation does not promote free movement within the Internal Market or create an environment conducive to healthy competition.
(9) The current disparities also lead to a weakening of the substantive law on intellectual property and to a fragmentation of the Internal Market in this field. This causes a loss of confidence in the Internal Market in business circles, with a consequent reduction in investment in innovation and creation. Infringements of intellectual property rights appear to be increasingly linked to organised crime. Increasing use of the Internet enables pirated products to be distributed instantly around the globe. Effective enforcement of the substantive law on intellectual property should be ensured by specific action at Community level. Approximation of the legislation of the Member States in this field is therefore an essential prerequisite for the proper functioning of the Internal Market.

(10) The objective of this Directive is to approximate legislative systems so as to ensure a high, equivalent and homogeneous level of protection in the Internal Market.

(11) This Directive does not aim to establish harmonised rules for judicial cooperation, jurisdiction, the recognition and enforcement of decisions in civil and commercial matters, or deal with applicable law. There are Community instruments which govern such matters in general terms and are, in principle, equally applicable to intellectual property.
(12) This Directive should not affect the application of the rules of competition, and in particular Articles 81 and 82 of the Treaty. The measures provided for in this Directive should not be used to restrict unduly competition in a manner contrary to the Treaty.

(13) It is necessary to define the scope of this Directive as widely as possible in order to encompass all the intellectual property rights covered by Community provisions in this field and/or by the national law of the Member State concerned. Nevertheless, that requirement does not affect the possibility, on the part of those Member States which so wish, to extend, for internal purposes, the provisions of this Directive to include acts involving unfair competition, including parasitic copies, or similar activities.

(14) The measures provided for in Articles 6(2), 8(1) and 9(2) need to be applied only in respect of acts carried out on a commercial scale. This is without prejudice to the possibility for Member States to apply those measures also in respect of other acts. Acts carried out on a commercial scale are those carried out for direct or indirect economic or commercial advantage; this would normally exclude acts carried out by end-consumers acting in good faith.


(17) The measures, procedures and remedies provided for in this Directive should be determined in each case in such a manner as to take due account of the specific characteristics of that case, including the specific features of each intellectual property right and, where appropriate, the intentional or unintentional character of the infringement.

(18) The persons entitled to request application of those measures, procedures and remedies should be not only the rightholders but also persons who have a direct interest and legal standing in so far as permitted by and in accordance with the applicable law, which may include professional organisations in charge of the management of those rights or for the defence of the collective and individual interests for which they are responsible.

(19) Since copyright exists from the creation of a work and does not require formal registration, it is appropriate to adopt the rule laid down in Article 15 of the Berne Convention, which establishes the presumption whereby the author of a literary or artistic work is regarded as such if his name appears on the work. A similar presumption should be applied to the owners of related rights since it is often the holder of a related right, such as a phonogram producer, who will seek to defend rights and engage in fighting acts of piracy.
(20) Given that evidence is an element of paramount importance for establishing the infringement of intellectual property rights, it is appropriate to ensure that effective means of presenting, obtaining and preserving evidence are available. The procedures should have regard to the rights of the defence and provide the necessary guarantees, including the protection of confidential information. For infringements committed on a commercial scale it is also important that the courts may order access, where appropriate, to banking, financial or commercial documents under the control of the alleged infringer.

(21) Other measures designed to ensure a high level of protection exist in certain Member States and should be made available in all the Member States. This is the case with the right of information, which allows precise information to be obtained on the origin of the infringing goods or services, the distribution channels and the identity of any third parties involved in the infringement.

(22) It is also essential to provide for provisional measures for the immediate termination of infringements, without awaiting a decision on the substance of the case, while observing the rights of the defence, ensuring the proportionality of the provisional measures as appropriate to the characteristics of the case in question and providing the guarantees needed to cover the costs and the injury caused to the defendant by an unjustified request. Such measures are particularly justified where any delay would cause irreparable harm to the holder of an intellectual property right.
(23) Without prejudice to any other measures, procedures and remedies available, rightholders should have the possibility of applying for an injunction against an intermediary whose services are being used by a third party to infringe the rightholder's industrial property right. The conditions and procedures relating to such injunctions should be left to the national law of the Member States. As far as infringements of copyright and related rights are concerned, a comprehensive level of harmonisation is already provided for in Directive 2001/29/EC. Article 8(3) of Directive 2001/29/EC should therefore not be affected by this Directive.

(24) Depending on the particular case, and if justified by the circumstances, the measures, procedures and remedies to be provided for should include prohibitory measures aimed at preventing further infringements of intellectual property rights. Moreover there should be corrective measures, where appropriate at the expense of the infringer, such as the recall and definitive removal from the channels of commerce, or destruction, of the infringing goods and, in appropriate cases, of the materials and implements principally used in the creation or manufacture of these goods. These corrective measures should take account of the interests of third parties including, in particular, consumers and private parties acting in good faith.
(25) Where an infringement is committed unintentionally and without negligence and where the corrective measures or injunctions provided for by this Directive would be disproportionate, Member States should have the option of providing for the possibility, in appropriate cases, of pecuniary compensation being awarded to the injured party as an alternative measure. However, where the commercial use of counterfeit goods or the supply of services would constitute an infringement of law other than intellectual property law or would be likely to harm consumers, such use or supply should remain prohibited.

(26) With a view to compensating for the prejudice suffered as a result of an infringement committed by an infringer who engaged in an activity in the knowledge, or with reasonable grounds for knowing, that it would give rise to such an infringement, the amount of damages awarded to the rightholder should take account of all appropriate aspects, such as loss of earnings incurred by the rightholder, or unfair profits made by the infringer and, where appropriate, any moral prejudice caused to the rightholder. As an alternative, for example where it would be difficult to determine the amount of the actual prejudice suffered, the amount of the damages might be derived from elements such as the royalties or fees which would have been due if the infringer had requested authorisation to use the intellectual property right in question. The aim is not to introduce an obligation to provide for punitive damages but to allow for compensation based on an objective criterion while taking account of the expenses incurred by the rightholder, such as the costs of identification and research.
(27) To act as a supplementary deterrent to future infringers and to contribute to the awareness of the public at large, it is useful to publicise decisions in intellectual property infringement cases.

(28) In addition to the civil and administrative measures, procedures and remedies provided for under this Directive, criminal sanctions also constitute, in appropriate cases, a means of ensuring the enforcement of intellectual property rights.

(29) Industry should take an active part in the fight against piracy and counterfeiting. The development of codes of conduct in the circles directly affected is a supplementary means of bolstering the regulatory framework. The Member States, in collaboration with the Commission, should encourage the development of codes of conduct in general. Monitoring of the manufacture of optical discs, particularly by means of an identification code embedded in discs produced in the Community, helps to limit infringements of intellectual property rights in this sector, which suffers from piracy on a large scale. However, these technical protection measures should not be misused to protect markets and prevent parallel imports.

(30) In order to facilitate the uniform application of this Directive, it is appropriate to provide for systems of cooperation and the exchange of information between Member States, on the one hand, and between the Member States and the Commission on the other, in particular by creating a network of correspondents designated by the Member States and by providing regular reports assessing the application of this Directive and the effectiveness of the measures taken by the various national bodies.
(31) Since, for the reasons already described, the objective of this Directive can best be achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.

(32) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular, this Directive seeks to ensure full respect for intellectual property, in accordance with Article 17(2) of that Charter,

HAVE ADOPTED THIS DIRECTIVE:
CHAPTER I

Objective and scope

Article 1

Subject-matter

This Directive concerns the measures, procedures and remedies necessary to ensure the enforcement of intellectual property rights. For the purposes of this Directive, the term "intellectual property rights" includes industrial property rights.
Article 2

Scope

1. Without prejudice to the means which are or may be provided for in Community or national legislation, in so far as those means may be more favourable for rightholders, the measures, procedures and remedies provided for by this Directive shall apply, in accordance with Article 3, to any infringement of intellectual property rights as provided for by Community law and/or by the national law of the Member State concerned.

2. This Directive shall be without prejudice to the specific provisions on the enforcement of rights and on exceptions contained in Community legislation concerning copyright and rights related to copyright, notably those found in Directive 91/250/EEC and, in particular, Article 7 thereof or in Directive 2001/29/EC and, in particular, Articles 2 to 6 and Article 8 thereof.
3. This Directive shall not affect:

(a) the Community provisions governing the substantive law on intellectual property, Directive 95/46/EC, Directive 1999/93/EC or Directive 2000/31/EC, in general, and Articles 12 to 15 of Directive 2000/31/EC in particular;

(b) Member States' international obligations and notably the TRIPS Agreement, including those relating to criminal procedures and penalties;

(c) any national provisions in Member States relating to criminal procedures or penalties in respect of infringement of intellectual property rights.
CHAPTER II

Measures, procedures and remedies

Section 1

General provisions

Article 3

General obligation

1. Member States shall provide for the measures, procedures and remedies necessary to ensure the enforcement of the intellectual property rights covered by this Directive. Those measures, procedures and remedies shall be fair and equitable and shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.

2. Those measures, procedures and remedies shall also be effective, proportionate and dissuasive and shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.
Article 4

Persons entitled to apply for the application of the measures, procedures and remedies

Member States shall recognise as persons entitled to seek application of the measures, procedures and remedies referred to in this Chapter:

(a) the holders of intellectual property rights, in accordance with the provisions of the applicable law,

(b) all other persons authorised to use those rights, in particular licensees, in so far as permitted by and in accordance with the provisions of the applicable law,

(c) intellectual property collective rights management bodies which are regularly recognised as having a right to represent holders of intellectual property rights, in so far as permitted by and in accordance with the provisions of the applicable law,

(d) professional defence bodies which are regularly recognised as having a right to represent holders of intellectual property rights, in so far as permitted by and in accordance with the provisions of the applicable law.
Article 5

Presumption of authorship or ownership

For the purposes of applying the measures, procedures and remedies provided for in this Directive,

(a) for the author of a literary or artistic work, in the absence of proof to the contrary, to be regarded as such, and consequently to be entitled to institute infringement proceedings, it shall be sufficient for his name to appear on the work in the usual manner;

(b) the provision under (a) shall apply mutatis mutandis to the holders of rights related to copyright with regard to their protected subject matter.
1. Member States shall ensure that, on application by a party which has presented reasonably available evidence sufficient to support its claims, and has, in substantiating those claims, specified evidence which lies in the control of the opposing party, the competent judicial authorities may order that such evidence be presented by the opposing party, subject to the protection of confidential information. For the purposes of this paragraph, Member States may provide that a reasonable sample of a substantial number of copies of a work or any other protected object be considered by the competent judicial authorities to constitute reasonable evidence.

2. Under the same conditions, in the case of an infringement committed on a commercial scale Member States shall take such measures as are necessary to enable the competent judicial authorities to order, where appropriate, on application by a party, the communication of banking, financial or commercial documents under the control of the opposing party, subject to the protection of confidential information.
Article 7

Measures for preserving evidence

1. Member States shall ensure that, even before the commencement of proceedings on the merits of the case, the competent judicial authorities may, on application by a party who has presented reasonably available evidence to support his claims that his intellectual property right has been infringed or is about to be infringed, order prompt and effective provisional measures to preserve relevant evidence in respect of the alleged infringement, subject to the protection of confidential information. Such measures may include the detailed description, with or without the taking of samples, or the physical seizure of the infringing goods, and, in appropriate cases, the materials and implements used in the production and/or distribution of these goods and the documents relating thereto. Those measures shall be taken, if necessary without the other party having been heard, in particular where any delay is likely to cause irreparable harm to the rightholder or where there is a demonstrable risk of evidence being destroyed.

Where measures to preserve evidence are adopted without the other party having been heard, the parties affected shall be given notice, without delay after the execution of the measures at the latest. A review, including a right to be heard, shall take place upon request of the parties affected with a view to deciding, within a reasonable period after the notification of the measures, whether the measures shall be modified, revoked or confirmed.
2. Member States shall ensure that the measures to preserve evidence may be subject to the lodging by the applicant of adequate security or an equivalent assurance intended to ensure compensation for any prejudice suffered by the defendant as provided for in paragraph 4.

3. Member States shall ensure that the measures to preserve evidence are revoked or otherwise cease to have effect, upon request of the defendant, without prejudice to the damages which may be claimed, if the applicant does not institute, within a reasonable period, proceedings leading to a decision on the merits of the case before the competent judicial authority, the period to be determined by the judicial authority ordering the measures where the law of a Member State so permits or, in the absence of such determination, within a period not exceeding 20 working days or 31 calendar days, whichever is the longer.

4. Where the measures to preserve evidence are revoked, or where they lapse due to any act or omission by the applicant, or where it is subsequently found that there has been no infringement or threat of infringement of an intellectual property right, the judicial authorities shall have the authority to order the applicant, upon request of the defendant, to provide the defendant appropriate compensation for any injury caused by those measures.

5. Member States may take measures to protect witnesses' identity.
Section 3

Right of information

Article 8

Right of information

1. Member States shall ensure that, in the context of proceedings concerning an infringement of an intellectual property right and in response to a justified and proportionate request of the claimant, the competent judicial authorities may order that information on the origin and distribution networks of the goods or services which infringe an intellectual property right be provided by the infringer and/or any other person who:

(a) was found in possession of the infringing goods on a commercial scale;

(b) was found to be using the infringing services on a commercial scale;
(c) was found to be providing on a commercial scale services used in infringing activities; or

(d) was indicated by the person referred to in point (a), (b) or (c) as being involved in the production, manufacture or distribution of the goods or the provision of the services.

2. The information referred to in paragraph 1 shall, as appropriate, comprise:

(a) the names and addresses of the producers, manufacturers, distributors, suppliers and other previous holders of the goods or services, as well as the intended wholesalers and retailers;

(b) information on the quantities produced, manufactured, delivered, received or ordered, as well as the price obtained for the goods or services in question.
3. Paragraphs 1 and 2 shall apply without prejudice to other statutory provisions which:

(a) grant the rightholder rights to receive fuller information;

(b) govern the use in civil or criminal proceedings of the information communicated pursuant to this Article;

(c) govern responsibility for misuse of the right of information; or

(d) afford an opportunity for refusing to provide information which would force the person referred to in paragraph 1 to admit to his own participation or that of his close relatives in an infringement of an intellectual property right; or

(e) govern the protection of confidentiality of information sources or the processing of personal data.
Section 4
Provisional and precautionary measures

Article 9
Provisional and precautionary measures

1. Member States shall ensure that the judicial authorities may, at the request of the applicant:

(a) issue against the alleged infringer an interlocutory injunction intended to prevent any imminent infringement of an intellectual property right, or to forbid, on a provisional basis and subject, where appropriate, to a recurring penalty payment where provided for by national law, the continuation of the alleged infringements of that right, or to make such continuation subject to the lodging of guarantees intended to ensure the compensation of the rightholder; an interlocutory injunction may also be issued, under the same conditions, against an intermediary whose services are being used by a third party to infringe an intellectual property right; injunctions against intermediaries whose services are used by a third party to infringe a copyright or a related right are covered by Directive 2001/29/EC;
(b) order the seizure or delivery up of the goods suspected of infringing an intellectual property right so as to prevent their entry into or movement within the channels of commerce.

2. In the case of an infringement committed on a commercial scale, the Member States shall ensure that, if the injured party demonstrates circumstances likely to endanger the recovery of damages, the judicial authorities may order the precautionary seizure of the movable and immovable property of the alleged infringer, including the blocking of his bank accounts and other assets. To that end, the competent authorities may order the communication of bank, financial or commercial documents, or appropriate access to the relevant information.

3. The judicial authorities shall, in respect of the measures referred to in paragraphs 1 and 2, have the authority to require the applicant to provide any reasonably available evidence in order to satisfy themselves with a sufficient degree of certainty that the applicant is the rightholder and that the applicant's right is being infringed, or that such infringement is imminent.
4. Member States shall ensure that the provisional measures referred to in paragraphs 1 and 2 may, in appropriate cases, be taken without the defendant having been heard, in particular where any delay would cause irreparable harm to the rightholder. In that event, the parties shall be so informed without delay after the execution of the measures at the latest.

A review, including a right to be heard, shall take place upon request of the defendant with a view to deciding, within a reasonable time after notification of the measures, whether those measures shall be modified, revoked or confirmed.

5. Member States shall ensure that the provisional measures referred to in paragraphs 1 and 2 are revoked or otherwise cease to have effect, upon request of the defendant, if the applicant does not institute, within a reasonable period, proceedings leading to a decision on the merits of the case before the competent judicial authority, the period to be determined by the judicial authority ordering the measures where the law of a Member State so permits or, in the absence of such determination, within a period not exceeding 20 working days or 31 calendar days, whichever is the longer.
6. The competent judicial authorities may make the provisional measures referred to in paragraphs 1 and 2 subject to the lodging by the applicant of adequate security or an equivalent assurance intended to ensure compensation for any prejudice suffered by the defendant as provided for in paragraph 7.

7. Where the provisional measures are revoked or where they lapse due to any act or omission by the applicant, or where it is subsequently found that there has been no infringement or threat of infringement of an intellectual property right, the judicial authorities shall have the authority to order the applicant, upon request of the defendant, to provide the defendant appropriate compensation for any injury caused by those measures.
Section 5
Measures resulting from a decision on the merits of the case

Article 10

Corrective measures

1. Without prejudice to any damages due to the rightholder by reason of the infringement, and without compensation of any sort, Member States shall ensure that the competent judicial authorities may order, at the request of the applicant, that appropriate measures be taken with regard to goods that they have found to be infringing an intellectual property right and, in appropriate cases, with regard to materials and implements principally used in the creation or manufacture of those goods. Such measures shall include:

(a) recall from the channels of commerce,

(b) definitive removal from the channels of commerce, or

(c) destruction.
2. The judicial authorities shall order that those measures be carried out at the expense of the infringer, unless particular reasons are invoked for not doing so.

3. In considering a request for corrective measures, the need for proportionality between the seriousness of the infringement and the remedies ordered as well as the interests of third parties shall be taken into account.
Article 11

Injunctions

Member States shall ensure that, where a judicial decision is taken finding an infringement of an intellectual property right, the judicial authorities may issue against the infringer an injunction aimed at prohibiting the continuation of the infringement. Where provided for by national law, non-compliance with an injunction shall, where appropriate, be subject to a recurring penalty payment, with a view to ensuring compliance. Member States shall also ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe an intellectual property right, without prejudice to Article 8(3) of Directive 2001/29/EC.
Article 12

Alternative measures

Member States may provide that, in appropriate cases and at the request of the person liable to be subject to the measures provided for in this Section, the competent judicial authorities may order pecuniary compensation to be paid to the injured party instead of applying the measures provided for in this Section if that person acted unintentionally and without negligence, if execution of the measures in question would cause him disproportionate harm and if pecuniary compensation to the injured party appears reasonably satisfactory.

Section 6

Damages and legal costs

Article 13

Damages

1. Member States shall ensure that the competent judicial authorities, on application of the injured party, order the infringer who knowingly, or with reasonable grounds to know, engaged in an infringing activity, to pay the rightholder damages appropriate to the actual prejudice suffered by him as a result of the infringement.
When the judicial authorities set the damages:

(a) they shall take into account all appropriate aspects, such as the negative economic consequences, including lost profits, which the injured party has suffered, any unfair profits made by the infringer and, in appropriate cases, elements other than economic factors, such as the moral prejudice caused to the rightholder by the infringement;

or

(b) as an alternative to (a), they may, in appropriate cases, set the damages as a lump sum on the basis of elements such as at least the amount of royalties or fees which would have been due if the infringer had requested authorisation to use the intellectual property right in question.
2. Where the infringer did not knowingly, or with reasonable grounds to know, engage in infringing activity, Member States may lay down that the judicial authorities may order the recovery of profits or the payment of damages, which may be pre-established.

Article 14

Legal costs

Member States shall ensure that reasonable and proportionate legal costs and other expenses incurred by the successful party shall, as a general rule, be borne by the unsuccessful party, unless equity does not allow this.
Section 7
Publicity measures

Article 15
Publication of judicial decisions

Member States shall ensure that, in legal proceedings instituted for infringement of an intellectual property right, the judicial authorities may order, at the request of the applicant and at the expense of the infringer, appropriate measures for the dissemination of the information concerning the decision, including displaying the decision and publishing it in full or in part. Member States may provide for other additional publicity measures which are appropriate to the particular circumstances, including prominent advertising.
CHAPTER III
Sanctions by Member States

Article 16
Sanctions by Member States

Without prejudice to the civil and administrative measures, procedures and remedies laid down by this Directive, Member States may apply other appropriate sanctions in cases where intellectual property rights have been infringed.
CHAPTER IV

Codes of conduct and administrative cooperation

Article 17

Codes of conduct

Member States shall encourage:

(a) the development by trade or professional associations or organisations of codes of conduct at Community level aimed at contributing towards the enforcement of the intellectual property rights, particularly by recommending the use on optical discs of a code enabling the identification of the origin of their manufacture;

(b) the submission to the Commission of draft codes of conduct at national and Community level and of any evaluations of the application of these codes of conduct.
Article 18

Assessment

1. Three years after the date laid down in Article 20(1), each Member State shall submit to the Commission a report on the implementation of this Directive.

On the basis of those reports, the Commission shall draw up a report on the application of this Directive, including an assessment of the effectiveness of the measures taken, as well as an evaluation of its impact on innovation and the development of the information society. That report shall then be transmitted to the European Parliament, the Council and the European Economic and Social Committee. It shall be accompanied, if necessary and in the light of developments in the Community legal order, by proposals for amendments to this Directive.

2. Member States shall provide the Commission with all the aid and assistance it may need when drawing up the report referred to in the second subparagraph of paragraph 1.
Article 19

Exchange of information and correspondents

For the purpose of promoting cooperation, including the exchange of information, among Member States and between Member States and the Commission, each Member State shall designate one or more national correspondents for any question relating to the implementation of the measures provided for by this Directive. It shall communicate the details of the national correspondent(s) to the other Member States and to the Commission.
CHAPTER V
Final provisions

Article 20
Implementation

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by ... * . They shall forthwith inform the Commission thereof.

When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the texts of the provisions of national law which they adopt in the field governed by this Directive.

* Twenty-four months after the date of adoption of this Directive.
Article 21

Entry into force

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

Article 22

Addressees

This Directive is addressed to the Member States.

Done at ,

For the European Parliament
The President

For the Council
The President
DRAFT LEGISLATIVE RESOLUTION

Adopted (P5_TA(2004)0146)

The following spoke:

Horst Schnellhardt, on behalf of the PPE-DE Group, asked for the vote to be postponed to voting time the following day.

The following spoke on this request: Dagmar Roth-Behrendt, on behalf of the PSE Group, Marit Paulsen (rapporteur) and Caroline F. Jackson, Chairman of the ENVI Committee.

Parliament rejected the request by EV (225 for, 257 against, 10 abstentions).

9.24. Intellectual property (vote)

Rapporteur: Janelly Fountou (A5-0468/2003)
(Simple majority)
(Voting record: Annex 1, Item 23)

The following spoke: Neil MacCormick, who asked for the rapporteur's situation to be clarified, given that several newspapers had alleged that she had failed to declare a personal interest in the matter, and Astrid Thors, who seconded his remarks (the President replied that he would refer the matter to the Bureau).

COMMISSION PROPOSAL

Approved as amended (P5_TA(2004)0147)

DRAFT LEGISLATIVE RESOLUTION

Adopted (P5_TA(2004)0147)

The following spoke:

— Marco Cappato, on the Italian version of amendment 83 (the President replied that the authoritative version was the English one).

— Raina A. Mercedes Echerer, on the French version of amendments 53 and 54, which had been tabled in English.

9.25. Electromagnetic compatibility (vote)

Rapporteur: Luis Berenguer Fuster (A5-0113/2004)
(Simple majority)
(Voting record: Annex 1, Item 24)
COUNCIL OF
THE EUROPEAN UNION

Brussels, 10 March 2004

Interinstitutional File:
2003/0024 (COD)

NOTE
from : General Secretariat
to : Permanent Representatives Committee / Council

I. INTRODUCTION

In accordance with the provisions of Article 251 (2) of the EC Treaty and the Joint Declaration on the Practical Arrangements for the Implementation of the Co-decision procedure ¹, a number of informal contacts were made between the Council, the European Parliament and the Commission with a view to reaching agreement on this dossier at first reading, thereby avoiding the need for a second reading and a conciliation.

In this context, the Rapporteur Ms. Fourtou (EPP/DE - FR) and representatives of three other political groups (PSE, ELDR and UEN) tabled 45 compromise amendments, which had been agreed during the informal meetings referred to above.

II. VOTE

The Plenary adopted all 45 of the compromise amendments. All other amendments were rejected.

The amendments adopted correspond to what was agreed between the three institutions and ought therefore to be acceptable to the Council.

The text of the amendments adopted and the European Parliament’s legislative resolution are set out in the annex hereto.
1. **P5_TA-PROV(2004)0147**


(Codecision procedure: first reading)

*The European Parliament,*

– having regard to the Commission proposal to the European Parliament and the Council (COM(2003) 46)\(^1\),

– having regard to Articles 251(2) and 95 of the EC Treaty, pursuant to which the Commission submitted the proposal to Parliament (C5-0055/2003),

– having regard to Rule 67 of its Rules of Procedure,

– having regard to the report of the Committee on Legal Affairs and the Internal Market and the opinion of the Committee on Industry, External Trade, Research and Energy (A5-0468/2003),

1. Approves the Commission proposal as amended;

2. Calls on the Commission to refer the matter to Parliament again if it intends to amend the proposal substantially or replace it with another text;

3. Instructs its President to forward its position to the Council and Commission.

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\(^1\) Not yet published in OJ.
<table>
<thead>
<tr>
<th>Text proposed by the Commission</th>
<th>Amendments by Parliament</th>
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<tbody>
<tr>
<td><strong>Amendment 56</strong></td>
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<tr>
<td>Recital 10</td>
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<tr>
<td>(10) The objective of this Directive is to approximate legislative systems so as to ensure a high, equivalent and homogeneous level of protection in the Internal Market. <strong>This protection is essential against infringements carried out on for commercial purposes or which cause significant harm to the right holder, apart from minor and isolated infringements.</strong></td>
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<td><strong>Amendment 57</strong></td>
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<td>Recital 12</td>
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<td>(12) This Directive shall not affect the application of the rules of competition, and in particular Articles 81 and 82 of the Treaty.</td>
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<td><strong>Amendment 58</strong></td>
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<td>Recital 13</td>
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<td>(13) It is necessary to define the scope of this Directive as widely as possible in order to encompass all the intellectual property rights covered by Community provisions in this field <strong>and by the resulting national provisions, while excluding certain activities which do not involve intellectual property in the strict sense.</strong> Nevertheless, that requirement does not affect the possibility, on the part of those Member States which so wish, to extend, for internal purposes, the provisions of this Directive to include acts involving unfair competition or similar activities.</td>
<td></td>
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<td></td>
<td>(13) It is necessary to define the scope of this Directive as widely as possible in order to encompass all the intellectual property rights covered by Community provisions in this field <strong>and/or by the national law of the Member State concerned.</strong> Nevertheless, that requirement does not affect the possibility, on the part of those Member States which so wish, to extend, for internal purposes, the provisions of this Directive to include acts involving unfair competition, <strong>including parasitic copies, or similar activities.</strong></td>
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</table>
Amendment 59
Recital 13a (new)

(13a) The measures provided for in Articles 7(2), 9(1) and 10(1a) of this Directive need to be applied only in respect of acts committed on a commercial scale. This is without prejudice to the possibility for Member States to apply these measures also in respect of other acts. The acts which are committed on a commercial scale are those carried out for direct or indirect economic or commercial advantage; this would normally exclude acts done by end consumers acting in good faith.

Amendment 60
Recital 15


Amendment 61
Recital 16

(16) The measures and procedures designed to enforce intellectual property rights must be effective and place the right holder in the situation in which he would have been were it not for the infringement in question.

(16) The measures and remedies provided for in this Directive should be determined in each case in such a manner as to take due account of the specific characteristics of that case, including the specific features of each intellectual property right and, where appropriate, the intentional or unintentional character of the infringement.
Amendment 62
Recital 17

(17) **In order to improve and extend access to justice**, the persons entitled to request application of these measures and procedures should be not only the right holders but also the professional organisations in charge of the management of those rights or for the defence of the collective and individual interests for which they are responsible.

(17) The persons entitled to request application of these measures and procedures should be not only the right holders but also **persons who have a direct interest and legal standing in so far as permitted by and in accordance with the applicable law, which may include professional organisations in charge of the management of those rights or for the defence of the collective and individual interests for which they are responsible.**

Amendment 63
Recital 18

(18) It is appropriate to adopt the rule in Article 15 of the Berne Convention, which establishes the presumption whereby the author of a literary or artistic work is regarded as such if his name appears on the work. **Moreover, as copyright exists as from the creation of a work and does not require formal registration as in the case of an industrial property right, it is useful to recall the principle that a work is considered to be sufficiently creative enjoy copyright protection until proven otherwise. This principle is of particular importance when an author seeks to defend his rights in a legal dispute and represents largely current practice in Member States’ national jurisdictions.**

(18) **Since copyright exists from the creation of a work and does not require formal registration**, it is appropriate to adopt the rule in Article 15 of the Berne Convention, which establishes the presumption whereby the author of a literary or artistic work is regarded as such if his name appears on the work. A similar presumption should be applied to the owners of related rights since often it is the holder of a related right, such as a phonogram producer, who will seek to defend rights and engage in fighting acts of piracy.

Amendment 64
Recital 19

(19) Given that evidence is an element of paramount importance for establishing the infringement of intellectual property, it is appropriate to ensure that effective means of presenting and obtaining evidence is available to all parties.

(19) Given that evidence is an element of paramount importance for establishing the infringement of intellectual property rights, it is appropriate to ensure that effective means of presenting, obtaining and protecting evidence are available. **The procedures must have regard to the rights of the defence and must provide the necessary guarantees including the protection of confidential information. For infringements carried out on a commercial scale it is also important that the courts may order access, where appropriate, to banking, financial or commercial documents under the control of the alleged infringer.**
Amendment 65
Recital 20

(20) If there is a duly established danger that evidence may be destroyed, an effective and inexpensive procedure must be made available to the parties which allows for the detailed description, with or without the taking of samples, or the physical seizure of the infringing goods and, in appropriate cases, of the documents relating thereto. The procedure must have regard to the rights of the defence and must provide the necessary guarantees.

Amendment 66
Recital 21

(21) Other measures designed to ensure a high level of protection exist in certain countries and must be made available in all the Member States. This is the case with the right of information, which allows precise information to be obtained on the origin of the infringing goods, the distribution channels and the identity of the third parties involved in the infringement, as well as the publication of judicial decisions on infringements of intellectual property, which makes it possible to inform the public and deter third parties from committing such infringements.

Amendment 67
Recital 22a (new)

(22a) Without prejudice to any other measures and remedies available, rightholders should have the possibility of applying for an injunction against an intermediary whose services are being used by a third party to infringe the rightholder's industrial property right. The conditions and modalities relating to such injunctions should be left to the national law of the Member States. As far as infringements of copyright and related rights are concerned, a comprehensive level of harmonisation is already provided for in Directive 2001/29/EC. The provision of Article 8, paragraph 3 of Directive 2001/29/EC should therefore not be affected by this Directive.
(23) Depending on the particular case, and if justified by circumstances, the measures and procedures to be provided for must include prohibitory measures aimed at preventing further infringements of intellectual property, as well as preventive and corrective measures, such as the confiscation of the infringing goods and other objects used predominantly for illegal purposes, removal from the channels of commerce, possible destruction and the recall, at the infringer's expense where appropriate, of the infringing goods placed on the market.

(23a) Member States should have the option of providing, in cases where an infringement has been carried out unintentionally and without negligence and where the corrective measures or injunctions provided for by this Directive would be disproportionate, for the possibility, in appropriate cases, of pecuniary compensation being awarded to the injured party as an alternative measure. However, where the commercial use of counterfeit goods or the supply of services would constitute an infringement of law other than intellectual property law or would be likely to harm consumers, such use or supply should remain prohibited.
(24) With a view to compensating for the prejudice suffered as a result of an infringement committed by an infringer who has engaged in an activity in the knowledge, or with reasonable grounds for knowing, that it would give rise to such an infringement, the amount of damages awarded to the right holder should be set either at a fixed rate equal to double the royalties or fees which would have been due if the infringer had requested authorisation to use the intellectual property right in question (the aim being to allow for compensation based on an objective criterion while taking account of the expenses incurred by the right holder, such as the costs of identification and research), or according to the actual prejudice (including loss of earnings) suffered by the right holder (compensatory damages), to which must be added the profits made by the infringer, which are not taken into account in calculating the compensatory damages. It must also be possible to take into account other elements, such as the moral prejudice caused to the right holder.

(24) With a view to compensating for the prejudice suffered as a result of an infringement committed by an infringer who has engaged in an activity in the knowledge, or with reasonable grounds for knowing, that it would give rise to such an infringement, the amount of damages awarded to the right holder should take account of all appropriate aspects, such as loss of earnings incurred by the right holder, or unfair profits made by the infringer and, where appropriate, any moral prejudice caused to the right holder. As an alternative, for example where it would be difficult to determine the amount of the actual prejudice suffered, the amount of the damages might be derived from elements such as the royalties or fees which would have been due if the infringer had requested authorisation to use the intellectual property right in question (the aim being not to introduce an obligation to provide for punitive damages but to allow for compensation based on an objective criterion while taking account of the expenses incurred by the right holder, such as the costs of identification and research).

(24a) To act as a supplementary deterrent to future infringers and contribute to the awareness of the public at large, it is useful to publicise judgments in intellectual property infringement cases.
Amendment 72
Recital 25

(25) In order to ensure the proper functioning of the Internal Market, and in accordance with the undertakings entered into under the TRIPS Agreement, and in particular Article 61 thereof, Member States are required to punish serious infringements of intellectual property in an effective, proportionate and deterrent fashion under criminal law. To this end, “serious infringement” means acts which are carried out intentionally and for commercial purposes. All or some of those participating in the infringement or attempted infringement, should be declared responsible, according to the particular country's internal law, as accomplices or instigators.

Amendment 73
Recital 26

(26) Protection measures make a major contribution towards combating infringements of intellectual property. Appropriate legal protection of security and authentication devices which protect against copying, manipulation or neutralisation is therefore necessary in the field of industrial property, and already exists in the field of copyright. Moreover, these protection measures targeting the abuse of technical devices to infringe intellectual property rights are in line with Article 6 of the Convention on Cybercrime adopted by the Council of Europe in Budapest on 23 November 2001.
Amendment 74
Recital 28

(28) In order to facilitate the uniform application of the provisions set out in this Directive, it is appropriate to provide for systems of cooperation and mutual assistance between Member States, on the one hand, and between the Member States and the Commission on the other, in particular by creating a network of correspondents designated by the Member States. Within this framework, a Contact Committee made up of national correspondents could also be set up within the Commission.

Amendment 75
Recital 29

(29) Since the objectives of this Directive cannot be sufficiently achieved by the Member States for the reasons already described, and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality as set out in that Article, this Directive does not go beyond what is necessary in order to achieve its objectives.

Amendment 76
Article 1

This Directive concerns the measures necessary to ensure the enforcement of intellectual property rights. For the purposes of this Directive, the term "intellectual property rights" includes industrial property rights.
Amendment 77

Article 2

1. Without prejudice to the means which are or may be provided for in Community or national legislation, in so far as those means may be more favourable for right holders, the measures provided for by this Directive shall apply to any infringement of *the rights deriving from Community and European acts on the protection of intellectual property, as listed in the Annex, and from the provisions adopted by the Member States in order to comply with those acts when the infringement is committed for commercial purposes or causes significant harm to the right holder.*

2. This Directive shall be without prejudice to the particular provisions on the enforcement of rights contained in Community legislation concerning copyright and notably those found in Directive 2001/29/EC.

3. This Directive shall not affect:
   (a) the Community provisions governing the substantive law on intellectual property, Directive 95/46/EC, Directive 1999/93/EC or Directive 2000/31/EC;

   (b) Member States’ international obligations and notably the Agreement on Trade-Related Aspects of Intellectual Property Rights (the “TRIPS Agreement”).

1. Without prejudice to the means which are or may be provided for in Community or national legislation, in so far as those means may be more favourable for right holders, the measures *and procedures* provided for by this Directive shall apply, *in accordance with Article 3,* to any infringement of *intellectual property rights as provided for by Community law and/or by the national law of the Member State concerned.*

2. This Directive shall be without prejudice to the particular provisions on the enforcement of rights and on exceptions contained in Community legislation concerning copyright and *rights related to copyright,* notably those found in Directive 91/250/EEC and, *in particular, Article 7 of that Directive,* or Directive 2001/29/EC and, *in particular, Articles 2 to 6 and Article 8 of that Directive.*

3. This Directive shall not affect:
   (a) the Community provisions governing the substantive law on intellectual property, Directive 95/46/EC, Directive 1999/93/EC or Directive 2000/31/EC *in general, and the provisions of Articles 12 to 15 in particular of that Directive*;

   (b) Member States’ international obligations and notably the Agreement on Trade-Related Aspects of Intellectual Property Rights (the “TRIPS Agreement”), *including those relating to criminal procedures and penalties;*

   (ba) any national provisions in Member States relating to criminal procedures or penalties in respect of infringement of *intellectual property rights.*
Amendment 78
Article 3

Member States shall provide for the proportionate measures and procedures needed to ensure the enforcement of the intellectual property rights covered by this Directive.

These measures and procedures shall be such as to remove from those responsible for an infringement of an intellectual-property right the economic benefits of that infringement. They shall be fair and equitable, and shall not be unnecessarily complicated or costly, nor entail unreasonable time-limits or unwarranted delays.

These measures and procedures shall be applied in such a manner as to avoid the creation of barriers to legitimate trade.

The measures and remedies shall also be effective, proportionate and dissuasive and shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.

Amendment 79
Article 4
Penalties

Member States shall ensure that any infringement of an intellectual property right covered by Article 2 is punishable by penalties. These penalties must be effective, proportionate and deterrent.

Amendment 80
Article 5

I. Member States shall recognise as persons entitled to apply for application of the measures referred to in this Chapter the holders of intellectual property rights, as well as all other persons authorised to use those rights in accordance with the applicable law, or their representatives.

Member States shall recognise as persons entitled to seek application of the measures and procedures referred to in this Chapter:

- the holders of intellectual property rights in accordance with the provisions of the applicable law,
- all other persons authorised to use those rights, in particular licensees, in so far as permitted by and in accordance with the provisions of the applicable law,
- intellectual property collective rights management bodies which are regularly recognised as having a right to represent holders of intellectual property rights, in so far as permitted by and in accordance with the applicable law,
- professional defence bodies which are regularly recognised as having a right to represent holders of intellectual property rights, in so far as permitted by and in accordance with the applicable law.

2. Member States shall confer upon rights management or professional defence bodies, wherever they represent intellectual property right holders or other persons authorised to use these rights according to the applicable law, an entitlement to seek application of the measures and procedures referred to in this Chapter, including the authority to initiate legal proceedings for the defence of those rights or of the collective or individual interests for which they are responsible.
Such entitlement shall be accorded to any properly constituted rights management body or professional defence body, regardless of the Member State in which it is established.
The first and second subparagraphs shall be without prejudice to the applicable rules on the representation of parties in court proceedings.

Amendment 81
Article 6

Until proved otherwise, authorship of a work shall be presumed to be vested in the person whose name, presented as being that of the author, is featured on copies of the work, or whose authorship is referred to on a copy of the work by way of a statement, label or other mark.

For the purposes of applying the measures and procedures provided for in this Directive,
(a) in order that the author of a literary or artistic work, in the absence of proof to the contrary, be regarded as such, and consequently be entitled to institute infringement proceedings, it shall be sufficient for his name to appear on the work in the usual manner;
(b) the provision under (a) shall apply mutatis mutandis to the holders of rights related to copyright with regard to their protected subject matter.

Amendment 82
Article 7

1. Member States shall lay down that, where a party has presented reasonably accessible evidence sufficient to support its claims, and has, in substantiating those claims, cited evidence which is to be found under the control of the opposing party, the judicial authorities may order that such evidence be produced by the opposing party, subject to the protection of confidential information.

2. In order to identify and prosecute the real beneficiaries of the infringement, Member States shall take such measures as are necessary to enable the responsible authorities to order the communication or seizure of banking, financial or commercial documents, subject to the protection of confidential information.

2. Under the same conditions, in the case of an infringement carried out on a commercial scale, Member States shall take such measures as are necessary to enable the competent judicial authorities to order, where appropriate, on application by a party, the communication of banking, financial or commercial documents under the control of the opposing party, subject to the protection of confidential information.
Amendment 83
Article 8

1. Member States shall lay down that, where there is a demonstrable risk that evidence may be destroyed even before the commencement of proceedings on the merits of the case, the judicial authorities may, in the event of an actual or imminent infringement of an intellectual property right, authorise in any place either the detailed description, with or without the taking of samples, or the physical seizure of the infringing goods, and, in appropriate cases, the documents relating thereto. These measures shall be taken by order issued on application, if necessary without the other party having been heard.

Where the evidence protection measures have been revoked, or where they lapse owing to any act or omission by the applicant, or where it is subsequently found that there has been no infringement of any intellectual property right, the judicial authorities shall have been empowered to order the applicant, at the defendant’s request, to provide the defendant with adequate compensation for any injury caused by the measures.

2. Member States shall lay down that physical seizure may be subject to the applicant’s lodging of an adequate guarantee intended to ensure compensation for any prejudice suffered by the defendant if the proceedings instituted against him are subsequently judged to be unfounded.

1. Member States shall ensure that even before the commencement of proceedings on the merits of the case the competent judicial authorities may, on application by a party who has presented reasonably available evidence to support his claims that his intellectual property right has been infringed or is about to be infringed, order prompt and effective provisional measures to preserve relevant evidence in regard to the alleged infringement, subject to the protection of confidential information. Such measures may include the detailed description, with or without the taking of samples, or the physical seizure of the infringing goods, and, in appropriate cases, the materials and implements used in the production and/or distribution of these goods and the documents relating thereto. These measures shall be taken, if necessary without the other party having been heard, in particular where any delay is likely to cause irreparable harm to the right holder, or where there is a demonstrable risk of evidence being destroyed.

Where evidence-protection measures have been adopted without the other party having been heard, the affected parties shall be given notice immediately after the execution of the measures at the latest. A review, including a right to be heard, shall take place upon request of the affected parties with a view to deciding, within a reasonable period after the notification of the measures, whether the measures shall be modified, revoked or confirmed.

2. Member States shall ensure that the evidence-protection measures may be subject to the applicant’s lodging of an adequate security or equivalent assurance intended to ensure compensation for any prejudice suffered by the defendant as provided for in paragraph 4.
3. Member States shall lay down that, if the applicant has not instituted legal proceedings leading to a decision on the merits of the case within 31 calendar days of the seizure, the seizure shall be null and void, without prejudice to the damages which may be claimed.

3. Member States shall ensure that the evidence-protection measures shall be revoked or otherwise cease to have effect upon request by the defendant, without prejudice to the damages which may be claimed, if the applicant has not instituted legal proceedings leading to a decision on the merits of the case before the competent judicial authority within a reasonable period, to be determined by the judicial authority ordering the measures when the law of a Member State so permits or, in the absence of such determination, within a period not to exceed 20 working days or 31 calendar days, whichever is the longer.

3a. Where the evidence-protection measures have been revoked, or where they lapse due to any act or omission by the applicant, or where it is subsequently found that there has been no infringement or threat of infringement of any intellectual property right, the judicial authorities shall have the authority to order the applicant, upon request of the defendant, to provide the defendant with appropriate compensation for any injury caused by these measures.

3b. Member States may take measures to protect witnesses' identity.

Amendment 84

Article 9

1. Member States shall lay down that, in order to deal with proceedings involving an infringement of an intellectual property right, or in response to a request for provisional or precautionary measures, the judicial authorities shall order, at the request of the right holder, unless particular reasons are invoked for not doing so, any person to provide information on the origin of the goods or services which are thought to infringe an intellectual property right and on the networks for their distribution or provision, respectively, if that person:

(a) was found in possession, for commercial purposes, of the infringing goods;

(a) was found in possession of the infringing goods on a commercial scale;

and in response to a justified and proportionate request of the claimant, the competent judicial authorities may order that information on the origin and distribution networks of the goods or services which infringe an intellectual property right be provided by the infringer and/or any other person who:
(b) was found to be using the infringing services for commercial purposes; or

(b) was found to be using the infringing services on a commercial scale;

(ba) was found to be providing on a commercial scale services used in infringing activities; or

(c) was indicated by the person referred to in point (a) or (b) as being at the origin of the goods or services or as being a link in the network for distributing those goods or providing those services.

(c) was indicated by the person referred to in point (a), (b) or (ba) as being involved in the production, manufacture or distribution of the goods or the provision of the services.

2. The information referred to in paragraph 1 shall comprise:

(a) the names and addresses of the producers, distributors, suppliers and other previous holders of the product or service, as well as the intended wholesalers and retailers;

(b) information on the quantities produced, manufactured, delivered, received or ordered, as well as the price obtained for the goods or services in question.

3. Paragraphs 1 and 2 shall apply without prejudice to other provisions which:

(a) grant the right holder rights to receive fuller information;

(b) govern the use in civil or criminal proceedings of the information communicated pursuant to this Article;

(c) govern responsibility for misuse of the right of information; or

(d) afford an opportunity for refusing to provide information which would force the person referred to in paragraph 1 to admit to the existence of an infringement of an intellectual property right.

(d) afford an opportunity for refusing to provide information which would force the person referred to in paragraph 1 to admit to his own participation or that of his close relatives in an infringement of an intellectual property right; or

(da) govern the protection of confidentiality of information sources or the treatment of personal data.
4. Apart from the cases referred to in paragraph 1, Member States shall lay down that, when the responsible authorities are in possession of the information referred to in paragraph 2, they may so inform the right holder, provided the latter is known, while complying with the rules on the protection of confidential information, in order to allow the right holder to institute proceedings leading to a decision on the merits of the case or to obtain provisional or precautionary measures.

Amendment 85

Article 10

1. Member States shall **lay down** that the judicial authorities may **serve the alleged infringer, or the intermediary whose services are being used by a third party to infringe a right, with an interlocutory injunction intended to prevent any impending infringement of an intellectual property right, or to forbid, on a provisional basis and subject to a recurrent fine, the continuation of the alleged infringements of an intellectual property right, or to make such continuation subject to the lodging of guarantees intended to ensure the compensation of the right holder. The judicial authorities shall be empowered to require the applicant to provide any reasonably available evidence in order to satisfy themselves with a sufficient degree of certainty that the applicant is the right holder and that the applicant’s right is being infringed or, that such infringement is imminent.**

1. Member States shall **ensure** that the judicial authorities may, **at the request of the applicant:**

(a) **issue against the alleged infringer an interlocutory injunction intended to prevent any impending infringement of an intellectual property right, or to forbid, on a provisional basis and subject, where appropriate, to a recurring penalty payment where provided for by national law, the continuation of the alleged infringements of that right, or to make such continuation subject to the lodging of guarantees intended to ensure the compensation of the right holder;** an interlocutory injunction may also be issued, under the same conditions, against an intermediary whose services are being used by a third party to infringe an intellectual property right; injunctions against intermediaries whose services are used by a third party to infringe a copyright or a related right are covered by Directive 2001/29/EC;

(b) **order the seizure or delivery up of the goods suspected of infringing an intellectual property right so as to prevent their entry into or movement within the channels of commerce.**
1a. In cases of infringement committed on a commercial scale, the Member States shall ensure that, if the injured party demonstrates circumstances likely to endanger the recovery of damages, the judicial authorities may order the precautionary seizure of the movable and immovable property of the alleged infringer, including the blocking of his bank accounts and other assets. To this end, the competent authorities may order the communication of bank, financial or commercial documents, or appropriate access to the relevant information.

1b. The judicial authorities shall, in respect of the measures referred to in paragraphs 1 and 1a, have the authority to require the applicant to provide any reasonably available evidence in order to satisfy themselves with a sufficient degree of certainty that the applicant is the right holder and that the applicant's right is being infringed, or that such infringement is imminent.

2. Member States shall lay down that the provisional measures referred to in paragraph 1 may in appropriate cases be taken without the defendant having been heard, in particular when any delay would cause irreparable prejudice to the right holder. In the event of this happening, the defendant shall be so informed without delay after the execution of the measures.

A review, including the right to be heard, shall take place at the request of the defendant in order to decide, within a reasonable time after notification of the measures, whether they are to be amended, revoked or confirmed.

2. Member States shall ensure that the provisional measures referred to in paragraphs 1 and 1a may, in appropriate cases, be taken without the defendant having been heard, in particular when any delay would cause irreparable prejudice to the right holder. In the event of this happening, the parties shall be so informed without delay after the execution of the measures at the latest.

A review, including the right to be heard, shall take place upon request of the defendant with a view to deciding, within a reasonable time after notification of the measures, whether these measures shall be modified, revoked or confirmed.
3. Member States shall lay down that a prohibitory measure shall be revoked if the applicant does not institute proceedings leading to a decision on the merits of the case within thirty-one calendar days from the day on which the right holder became aware of the facts on which it is based.

4. The judicial authorities may make the prohibition subject to the lodging by the applicant of adequate guarantees intended to ensure any compensation of the prejudice suffered by the defendant if the proceedings on the merits are subsequently judged to be unfounded.

5. Where the provisional measures have been revoked or where they lapse due to any act or omission by the applicant, or where it is subsequently found that there has been no infringement or threat of infringement of an intellectual property right, the judicial authorities shall have the authority to order the applicant, at the request of the defendant, to provide the defendant adequate compensation for any injury caused by these measures.

3. Member States shall ensure that the provisional measures referred to in paragraphs 1 and 1a shall be revoked, or otherwise cease to have effect, upon request by the defendant, if the applicant does not institute proceedings leading to a decision on the merits of the case before the competent judicial authority within a reasonable period to be determined by the judicial authority ordering the measures where the Member State’s law so permits or, in the absence of such determination, within a period not to exceed 20 working days or 31 calendar days, whichever is the longer.

4. The competent judicial authorities may make the provisional measures referred to in paragraphs 1 and 1a subject to the lodging by the applicant of adequate security or equivalent assurance intended to ensure any compensation of the prejudice suffered by the defendant as provided for in paragraph 5.

5. Where the provisional measures are revoked or where they lapse due to any act or omission by the applicant, or where it is subsequently found that there has been no infringement or threat of infringement of an intellectual property right, the judicial authorities shall have the authority to order the applicant, upon request of the defendant, to provide the defendant with appropriate compensation for any injury caused by these measures.
Amendment 86
Article 11

Precautionary measures
1. The Member States shall lay down that, in appropriate cases, and in particular if the injured party demonstrates circumstances likely to threaten the recovery of damages, and if necessary without the other party having been heard, the judicial authorities may authorise the precautionary seizure of the fixed and non-fixed assets of the infringer, including the blocking of his bank accounts and other assets.

In order to ensure the implementation of the provisions set out in the first paragraph, Member States shall also take the necessary steps to allow the judicial authorities to order the communication or seizure of bank, financial or commercial documents.

2. The judicial authorities may make the measures provided for in paragraph 1 subject to the lodging by the applicant of guarantees adequate to ensure possible compensation for the prejudice suffered by the defendant if the proceedings on the merits are subsequently judged to be unfounded.

3. Where the precautionary measures are revoked, or where they lapse due to any act or omission by the applicant, or where it is subsequently found that there has been no infringement of an intellectual property right, the judicial authorities shall have the authority to order the applicant, upon request of the defendant, to provide the defendant adequate compensation for any injury caused by these measures.
Amendment 87
Article 12

Recall of goods
Without prejudice to the damages due to the right holder by reason of the infringement, Member States shall lay down that the judicial authorities may order the recall, at the infringer's expense in appropriate cases, of the goods which have been found to infringe an intellectual property right.

Corrective measures
Without prejudice to any damages due to the right holder by reason of the infringement, and without compensation of any sort, Member States shall ensure that the competent judicial authorities may order, at the request of the applicant, that appropriate measures be taken with regard to goods that they have found to be infringing an intellectual property right and, in appropriate cases, with regard to materials and implements principally used in the creation or manufacture of these goods. Such measures shall include:
(a) recall from the channels of commerce,
(b) definitive removal from the channels of commerce or
(c) destruction.
The judicial authorities shall order that these measures shall be carried out at the expense of the infringer, unless particular reasons are invoked for not doing so.
In considering a request for corrective measures, the need for proportionality between the seriousness of the infringement and the remedies ordered as well as the interests of third parties shall be taken into account.

Amendment 88
Article 13

Disposal outside the channels of commerce
Member States shall lay down that the judicial authorities may order that the goods which have been found to infringe an intellectual property right, as well as the materials and implements used primarily for the creation or the manufacture of the goods in question, be disposed of outside the channels of commerce, without any compensation being due.

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Amendment 89
Article 14

Article 14

Destruction of goods
Member States shall lay down that the judicial authorities may order the destruction of the goods which have been found to infringe an intellectual property right, without there being any entitlement to compensation.

Amendment 90
Article 15

Preventive measures

1. Member States shall lay down that, when a judicial decision has been taken finding an infringement of an intellectual property right, the judicial authorities may serve the infringer with an injunction aimed at prohibiting the continuation of the infringement. Non-compliance with an injunction shall be punishable by a fine accompanied, where applicable, by a recurring fine, with a view to ensuring compliance.

2. Member States shall ensure that right holders are able to apply for an injunction to be addressed to intermediaries whose services are used by third parties to infringe an intellectual property right.

Injunctions
Member States shall ensure that, when a judicial decision has been taken finding an infringement of an intellectual property right, the judicial authorities may issue against the infringer an injunction aimed at prohibiting the continuation of the infringement. Where provided for by national law, non-compliance with an injunction shall, where appropriate, be subject to a recurring penalty payment, with a view to ensuring compliance. Member States shall also ensure that right holders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe an intellectual property right, without prejudice to Article 8(3) of Directive 2001/29/EC.
Amendment 91
Article 16

In appropriate cases, Member States shall lay down that, if the person liable to be subjected to the measures provided for in this Section has acted without fault or negligence but has nevertheless caused injury to the applicant, that person may, if execution of the measures in question would cause him disproportionate harm and if the injured party could reasonably be satisfied with pecuniary compensation, compensate that party in cash, with the latter’s agreement.

Member States may provide that, in appropriate cases and at the request of the person liable to be subjected to the measures provided for in this Section, the competent judicial authorities may order pecuniary compensation to be paid to the injured party instead of applying the above measures if that person has acted unintentionally and without negligence, if execution of the measures in question would cause him disproportionate harm and if pecuniary compensation to the injured party appears reasonably satisfactory.

Amendment 92
Article 17

1. Member States shall lay down that the judicial authorities shall order an infringer to pay the right holder adequate damages in reparation of the damage incurred by the latter as a result of his intellectual property right being infringed through the infringer having engaged in an activity in the knowledge, or with reasonable grounds for knowing, that it would give rise to such an infringement.

To this end, the competent authorities shall award, at the request of the prejudiced party:
(a) either damages set at double the royalties or fees which would have been due if the infringer had requested authorisation to use the intellectual property right in question;

(b) or compensatory damages corresponding to the actual prejudice (including lost profits) suffered by the right holder as a result of the infringement.

1. Member States shall ensure that the competent judicial authorities, on application by the injured party, shall order the infringer who knowingly, or with reasonable grounds to know, engaged in an infringing activity, to pay the right holder damages appropriate to the actual prejudice suffered by him as a result of the infringement.

When the judicial authorities set the damages:
(a) they shall take into account all appropriate aspects, such as the negative economic consequences, including lost profits, which the injured party has suffered, any unfair profits made by the infringer and, in appropriate cases, elements other than economic factors, such as the moral prejudice caused to the right holder by the infringement;

(b) as an alternative to (a), they may, in appropriate cases, set the damages as a lump sum on the basis of elements such as at least the amount of royalties or fees which would have been due if the infringer had requested authorisation to use the intellectual property right in question.
In appropriate cases, Member States shall lay down that the prejudice suffered can also be deemed to include elements other than economic factors, such as the moral prejudice caused to the right holder by the infringement.

2. In the case provided for in paragraph 1, point (b), Member States may provide for the recovery, for the benefit of the right holder, of all the profits made by the infringer which are attributable to that infringement and which are not taken into account when calculating the compensatory damages.

For calculating the amount of the profits made by the infringer, the right holder is bound to provide evidence only with regard to the amount of the gross income achieved by the infringer, with the latter being bound to provide evidence of his deductible expenses and profits attributable to factors other than the protected object.

2. In cases where the infringer did not knowingly, or with reasonable grounds to know, engage in infringing activity, Member States may lay down that the judicial authorities may order the recovery of profits or the payment of damages which may be pre-established.

Amendment 93
Article 18

Member States shall lay down that the legal costs, lawyer's fees and any other expenses incurred by the successful party shall be borne by the other party, unless equity or the economic situation of the other party does not allow this. The responsible authorities shall determine the sum to be paid.

Member States shall ensure that reasonable and proportionate legal costs and other expenses incurred by the successful party shall as a general rule be borne by the unsuccessful party, unless equity does not allow this.
Amendment 94

Article 19

1. Member States shall lay down that, in legal proceedings instituted for infringement of an intellectual property right, the judicial authorities may order, at the request of the right holder and at the expense of the infringer, that the decision be displayed and published in full or in part in the newspapers designated by the right holder.

2. Member States may also provide for other publicity measures which are appropriate to the particular circumstances.
Article 20

1. Member States shall ensure that all serious infringements of an intellectual property right, as well as attempts at, participation in and instigation of such infringements, are treated as a criminal offence. An infringement is considered serious if it is intentional and committed for commercial purposes.

2. Where natural persons are concerned, Member States shall provide for criminal sanctions, including imprisonment.

3. As regards natural and legal persons, the Member States shall provide for the following sanctions:
   (a) fines;
   (b) confiscation of the goods, instruments and products stemming from the offences referred to in paragraph 1, or of goods whose value corresponds to those products.

   In appropriate cases, Member States shall also provide for the following sanctions:
   (a) destruction of the goods infringing an intellectual property right;
   (b) total or partial permanent or temporary closure of the establishment used primarily to commit the infringement;
   (c) a permanent or temporary ban on engaging in commercial activities;
   (d) placing under judicial supervision;
   (e) judicial winding-up;
   (f) a ban on access to public assistance or subsidies;
   (g) publication of judicial decisions.

4. For the purposes of this Chapter, the term “legal person” shall be understood to mean any legal entity having such status under the applicable national law, except for States or any other public bodies acting in the exercise of their prerogative of public power, as well as public international organisations.

Without prejudice to the civil and administrative measures and procedures laid down by this Directive, Member States may apply other appropriate sanctions in cases where intellectual property rights have been infringed.
Amendment 96
Article 21

Article 21

Legal protection of technical devices
1. Without prejudice to particular provisions applicable in the field of copyright, related rights and the sui generis right of the creator of a database, Member States shall provide for appropriate legal protection against the manufacture, import, distribution and use of illegal technical devices.

2. For the purposes of this Chapter,
(a) “technical device” means any technology, device or component which, in the normal course of its functioning, is designed for the manufacture of authentic goods and the incorporation therein of elements which are manifestly identifiable by customers and consumers and which make it easier to recognise the goods as being authentic.
(b) “illegal technical device” means any technical device which is designed to circumvent a technical device which permits the manufacture of goods infringing industrial property rights and incorporating the manifestly identifiable elements described in point (a).

Amendment 97
Article 22

1. Member States shall encourage:
(a) the development by trade or professional associations or organisations of codes of conduct at Community level aimed at contributing towards the enforcement of the intellectual property rights referred to in Article 2;

Member States shall encourage:
(a) the development by trade or professional associations or organisations of codes of conduct at Community level aimed at contributing towards the enforcement of the intellectual property rights referred to in Article 2, particularly by recommending the use on optical discs of a source code enabling the identification of the origin of their manufacture;
(b) the establishment, by optical disc manufacturers and the professional organisations concerned, of codes of conduct aimed at helping manufacturers to combat infringements of intellectual property, particularly by recommending the use on optical discs of a source code enabling the identification of the origin of their manufacture;

(c) the submission to the Commission of draft codes of conduct at national and Community level and of any evaluations of the application of these codes of conduct.

2. The codes of conduct must be in accordance with Community law and notably the rules on competition and protection of personal data.

Amendment 98
Article 23, paragraph 1

1. Three years after the date laid down in Article 26(1), each Member State shall submit to the Commission a report informing it of the situation with regard to implementation of this Directive. On the basis of those reports, the Commission shall draw up a report on the application of this Directive, including an assessment of the effectiveness of the measures taken by the various competent bodies and instances, as well as an evaluation of its impact on innovation and the development of the information society. That report shall then be transmitted to the European Parliament, the Council and the European Economic and Social Committee. It shall be accompanied, if necessary, by proposals for amendments to this Directive.

(b) the submission to the Commission of draft codes of conduct at national and Community level and of any evaluations of the application of these codes of conduct.

1. Three years after the date laid down in Article 25(1), each Member State shall submit to the Commission a report informing it of the situation with regard to implementation of this Directive. On the basis of those reports, the Commission shall draw up a report on the application of this Directive, including an assessment of the effectiveness of the measures taken, as well as an evaluation of its impact on innovation and the development of the information society. That report shall be transmitted to the European Parliament, the Council and the European Economic and Social Committee. It shall be accompanied, if necessary, and in the light of developments in the Community legal order, by proposals for amendments to this Directive.
Amendment 99

Article 24

Correspondents

1. Each Member State shall designate one or more correspondents (referred to hereinafter as “the national correspondents”) for any question relating to the implementation of the measures provided for by this Directive. It shall communicate the details of the correspondent(s) to the other Member States and to the Commission.

2. For the purposes of applying this Directive, the Member States shall cooperate with the other Member States and with the Commission via the national correspondents. They shall provide the assistance and information requested by the other Member States or the Commission as rapidly as possible, including by appropriate electronic means.

Amendment 100

Article 25, paragraph 1

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive not later than eighteen months after the date of its adoption. They shall immediately inform the Commission thereof. When Member States adopt these provisions, these shall contain a reference to this Directive or shall be accompanied by such reference at the time of their official publication. The procedure for such reference shall be adopted by Member States.

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by ...* at the latest. They shall forthwith inform the Commission thereof. When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

* Twenty-four months after the date of adoption of this Directive.
2570th Council meeting
- Competitiveness -
(Internal market, Industry and Research)
Brussels, 11 March 2004

President: Ms Mary HARNEY
An Tánaiste (Deputy Prime Minister) and Minister for Enterprise, Trade and Employment of Ireland

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The documents whose references are given in the text are available on the Council's Internet site
http://ue.eu.int.

Acts adopted with statements for the Council minutes which may be released to the public are indicated by an asterisk; these statements are available on the above mentioned Council Internet site or may be obtained from the Press Office.
PARTICIPANTS

The Governments of the Member States and the European Commission were represented as follows:

**Belgium**:
- Mr Berd GENTGES Minister for Education and Training, Culture and Tourism (German-speaking Community)

**Denmark**:
- Mr Bendt BENDTSEN Minister for Economic Affairs, Trade and Industry
- Mr Helge SANDER Minister for Science, Technology and Development

**Germany**:
- Mr Georg Wilhelm ADAMOWITSCH State Secretary, Federal Ministry of Economic Affairs and Labour
- Mr Hansjörg GEIGER State Secretary, Federal Ministry of Justice
- Mr Wolf-Dieter DUDENHAUSEN State Secretary, Research

**Greece**:
- Mr Dimitris RALLIS Deputy Permanent Representative

**Spain**:
- Mr Ramón de MIGUEL Y EGEA State Secretary for European Affairs
- Mr Pedro MORENÉS EULATE State Secretary for Science and Technology Policy

**France**:
- Ms Noëlle LENOIR Minister attached to the Minister for Foreign Affairs, with responsibility for European Affairs
- Ms Claudie HAIGNERÉ Minister attached to the Minister for Youth, Education and Research, with responsibility for Research and New Technology

**Ireland**:
- Mr Michael AHERN Minister of State at the Department of Enterprise, Trade and Employment (with special responsibility for Trade and Commerce)

**Italy**:
- Ms Letizia MORATTI Minister for Education, the Universities and Research
- Mr Rocco BUTTIGLIONE Minister without portfolio, Minister for Community policies
- Mr Antonio MARZANO Minister for Production Activities

**Luxembourg**:
- Ms Erna HENNICOT-SCHOEPGES Minister for Culture, Higher Education and Research, Minister for Public Works
- Mr Henri GRETHEN Minister for Economic Affairs, Minister for Transport

**Netherlands**:
- Mr Laurens Jan BRINKHORST Minister for Economic Affairs
- Ms Maria van der HOEVEN Minister for Education, Cultural Affairs and Science

**Austria**:
- Mr Martin BARTENSTEIN Federal Minister for Economic Affairs and Labour

**Portugal**:
- Mr Carlos TAVARES Minister for Economic Affairs
- Ms Maria da Graça CARVALHO Minister for Science and Higher Education
Finland:
Mr Mauri PEKKARINEN Minister for Trade and Industry

Sweden:
Mr Thomas ÖSTROS Minister for Education

United Kingdom:
Ms Patricia HEWITT Secretary of State for Trade and Industry and Minister for Women and Equality

* * *

Commission:
Mr Frederik BOLKESTEIN Member
Mr Philippe BUSQUIN Member
Mr Mario MONTI Member
Mr Erkki LIIKANEN Member
Mr David BYRNE Member
The Governments of the Accession States were represented as follows:

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<th>Country</th>
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</thead>
<tbody>
<tr>
<td>Czech Republic</td>
<td>Mr Miroslav SOMOL (Deputy Minister, Ministry of Industry and Trade) Mr Petr KOLAR</td>
</tr>
<tr>
<td>Estonia</td>
<td>Mr Meelis ATONEN (Minister for Economic Affairs and Communications) Mr Toivo MAIMETS</td>
</tr>
<tr>
<td>Cyprus</td>
<td>Mr Soteris SOTERIOU (Permanent Secretary, Ministry of Commerce, Industry and Tourism)</td>
</tr>
<tr>
<td>Latvia</td>
<td>Mr Kaspars GERHARDS (State Secretary, Ministry of Economic Affairs)</td>
</tr>
<tr>
<td>Lithuania</td>
<td>Mr Rimantas VAITKUS (Deputy Minister for Education and Science) Mr Nerijus EIDUKEVIČIUS (Deputy Minister for the Economy)</td>
</tr>
<tr>
<td>Hungary</td>
<td>Mr Péter GOTTFRIED (Head of State Secretariat for Integration and External Economic Relations, Ministry of Foreign Affairs)</td>
</tr>
<tr>
<td>Malta</td>
<td>Mr Edwin VASSALLO (Parliamentary Secretary, Ministry of Finance and Economic Affairs)</td>
</tr>
<tr>
<td>Poland</td>
<td>Ms Danuta HÜBNER (Minister, Office of the Committee for European Integration, Member of the Council of Ministers)</td>
</tr>
<tr>
<td>Slovenia</td>
<td>Ms Tea PETRIN (Minister for the Economy)</td>
</tr>
<tr>
<td>Slovakia</td>
<td>Mr László POMOTHY (State Secretary at the Ministry of the Economy) Mr František TÓTH (State Secretary at the Ministry of Education)</td>
</tr>
</tbody>
</table>
ITEMS DEBATED

CONTRIBUTION TO THE SPRING EUROPEAN COUNCIL MEETING

The Council had an in-depth policy debate based on a wide range of issues affecting competitiveness at European level. Following the discussions, the Council approved the "Key Issues and Priorities Paper" as its contribution to the Spring European Council and requested the General Affairs Council to forward it to the Spring European Council.

In this Paper, the Council committed itself to undertaking a series of clearly defined actions aimed at enhancing competitiveness, developing the integrated approach, moving forward on regulatory reform and ensuring that the right framework conditions exist for enterprise, entrepreneurship and industry. The key issues paper underlines the vital importance of investment in research and development and of innovation and stresses as well the full integration of the acceding Member States in all these efforts.

STIMULATING ENTREPRENEURSHIP – Council Conclusions

The Council adopted Conclusions on "Stimulating Entrepreneurship" as set out below:

“THE COUNCIL OF THE EUROPEAN UNION,

1. RECALLING the conclusions of various European Councils ¹ calling for action to improve entrepreneurship and framework conditions for small businesses;
2. RECOGNISING that entrepreneurship is a major driver of innovation, competitiveness, employment and growth and that encouraging and training more people to become entrepreneurs are key requirements for the achievement of the Lisbon objectives;
3. WELCOMES the fact that the Commission’s communication "Action Plan: The European agenda for Entrepreneurship" identifies principal areas where the environment for entrepreneurship needs to be improved, as well as a range of actions to create a more favourable environment for and to give a strong impetus to entrepreneurship by raising its general profile and WELCOMES the progress achieved in implementing the European Charter for small enterprises;
4. STRESSES that within the context of the integrated approach to competitiveness, there are policy priorities including access to finance, training/education, and better regulation, which are crucial to the success of the relevant Community Action Plans and measures;
5. Considering the urgent need for concrete results to deliver these policy priorities, CALLS ON the Commission to set out a more ambitious timetable for undertaking these actions and ENcourAGES Member States to exploit best practices, in particular those identified through the open method of coordination;
6. INVITES Member States and the Commission, within their respective competencies, to intensify efforts and take early action in:
   • improving education and training for entrepreneurship at all levels;

• improving the regulatory environment, building on the "Better Regulation" Action Plan; the impact of proposed legislation on small businesses and entrepreneurs should be assessed, informed by systematic consultation; the cumulative effects of existing legislation should also be assessed in order to reduce the greater relative burden on small businesses;
• supporting and facilitating access to finance for entrepreneurs, in particular with regard to start-ups, transfers, innovative businesses and entrepreneurs in under-represented groups; concerns about the implications of the Basel II Accord for small businesses should also be taken into account;
• ensuring that the State Aids framework is appropriately targeted towards addressing market failures that inhibit entrepreneurial and innovative activity;
• enhancing mechanisms to strengthen the dialogue between entrepreneurs and policy makers, and improving access to information;
• raising the profile of successful entrepreneurs and of entrepreneurship policies, including an examination of the feasibility of establishing a "European Centres of Enterprise" awards scheme;
• identifying and jointly agreeing appropriate indicators of performance and progress as a basis for the subsequent voluntary setting of targets for increased entrepreneurial activity, taking into account global markets;
• examining the European Charter for small enterprises in the light of priorities identified in the Commission's Entrepreneurship Action Plan, within the same timeframe as the mid-term review of the Lisbon strategy, in order to ensure that it reflects in a coherent way the specific needs of entrepreneurs and small businesses in an enlarged European Union;
• streamlining all reporting arrangements between the Member States and the Commission in respect of the Charter and other related instruments."

REGISTRATION, EVALUATION, AUTHORISATION AND RESTRICTING OF CHEMICALS (REACH)

The Council took note of a Presidency progress report (6200/04) and of remarks by Commissioner Liikanen on the state of play of the on-going examination of the REACH proposal in the ad-hoc Working Party, and in particular, on further work being undertaken by the Commission with regard to impact assessment.

Both the Competitiveness and the Environment Council will hold policy debates on REACH at their sessions in May and June, respectively.

It is recalled that the main goals of the Community’s chemicals policy are to avoid chemical contamination of air, water, soil and buildings to prevent damage to biodiversity and to improve the health and safety of workers and the general public. It is aimed at preserving a sensitive balance between the environmental benefits of REACH and its effects on the competitiveness of European industry.
TDM FOR SHIPBUILDING

The Council approved, by qualified majority, with the Danish, Netherlands, Finnish and Swedish delegations voting against, a Council Regulation concerning a temporary defensive mechanism (TDM) for shipbuilding.

Amending Regulation (EC) No 1177/2002, the new Regulation (6532/04) aims at prolonging, by a maximum of one year, until 31 March 2005, the use of limited contract-related operating aid to certain segments of the shipbuilding industry which is subject to allegedly unfair competition from the Republic of Korea.

The existing TDM Regulation was adopted on 27 June 2002 after it had been shown that Community shipyards had suffered adverse effects from unfair Korean competition. It allows for a 6% state aid for the construction of container ships, chemical and product tankers and Liquefied Natural Gas carriers. It was originally launched as a measure for the period specified to resolve the dispute under WTO rules between the Community and Korea. However, settlement of the dispute has taken longer than expected, although it is hoped that it will be concluded by the beginning of 2005. The Commission has therefore proposed a prolongation of TDM, which will terminate either when the WTO dispute is settled or on 31 March 2005, whichever is the earlier.

REGULATION ON CONSUMER PROTECTION COOPERATION

The Council took note of a progress report as well as of interventions made by some delegations and Commissioner Byrne on the state of play on the draft Regulation on cooperation between national authorities responsible for the enforcement of consumer protection laws. The Council invited the Permanent Representatives Committee to continue examining this file with a view to reaching a first-reading agreement with the European Parliament.

The proposal aims at providing for cooperation between the enforcement authorities in dealing with intra-Community infringements that disrupt the internal market, and at contributing to improved enforcement of consumer protection laws as well as to the monitoring of the protection of consumers’ economic interests. The main issues dealt with in the progress report concern the designation and powers of the competent authorities responsible for the enforcement and the question of the overlap between the administrative and the judicial measures adopted in compliance with the Regulation.

It is recalled that a policy debate held by the EPSCO Council of 1 December revealed the worries of a number of delegations regarding, on the one hand, the creation of a bureaucratically and financially cumbersome structure and, on the other hand, the risk of interference with existing national systems. Taking into account these concerns, the Irish Presidency decided to draw up a compromise proposal and, in parallel, held informal contacts with the European Parliament.
FRAMWORK CONDITIONS FOR COMPETITIVE SERVICES INDUSTRIES -
Council Conclusions - Public Debate

The Council had an exchange of views on the draft framework Directive on Services in the Internal Market, adopted by the Commission on 13 January 2004. Presenting the new proposal, Commissioner Bolkestein pointed out that it aims at establishing a legal framework to facilitate the exercise of establishment for economic service providers and the free movement of services in the internal market. By eliminating certain obstacles, its main objective is to ensure legal certainty for service providers and recipients.

Having taken note of the presentation, the Council stressed the importance of the proposed Directive to which it will give high priority with a view to making speedy progress.

Preceding the debate, the Council drew Conclusions with regard to the Commission Communication on the competitiveness of business-related services, as set out below:

"THE COUNCIL,

1. RECALLING
– the crucial role of services in the European economy and their potential for productivity growth and employment creation, in particular in the context of achieving the objectives of the Lisbon strategy;
– the efforts being made in the context of the integrated strategy for competitiveness for improving the competitiveness of industry and business in general, promoting secure and favourable framework conditions and encouraging entrepreneurship;

2. WELCOMES the Commission's communication on "the Competitiveness of Business-related Services 1 and their contribution to the performance of European enterprises" 2 and RECOGNISES that the measures identified by the Commission could contribute to increasing productivity growth and employment;

3. RECOGNISES that the proposed framework directive on services in the Internal Market constitutes an important element in improving the competitiveness of business-related services and UNDERTAKES to examine this proposal as a matter of priority;

4. WELCOMES, therefore, the intention of the Commission to establish a goal-oriented European Forum on business-related services for the purpose of effectively consulting stakeholders and other experts in its development of an Action Plan for business-related services;

5. In the light of the Commission's analysis and in the context of improving the competitiveness of business-related services, STRESSES in particular the need for action on a European level to:

1 As defined in the Commission's communication, business-related services consist of four major groups of activities, namely business services, distributive trades, network services and financial services, performing in different market conditions.

2 15933/03 COMPET 82 MI 316 IND 182 ECO 270.
– develop the internal market and competitive framework conditions for business-related services in order to improve competition, strengthen market integration and meet global competitive challenges;
– promote continuous learning and updating of skills of the labour force and stimulate the integration of ICT into business processes in order to improve productivity;
– improve the understanding of linkages between business-related services and other sectors of the economy, in particular the manufacturing industries and the public sector;
– improve statistical information: business-related services are of considerable economic importance to the EU. Better data and economic analysis constitute essential instruments for achieving better knowledge and determining policy choices. Improvements in statistical information should be achieved whilst minimising the overall administrative burden;
– encourage R&D and non-technological innovation, the establishment of voluntary standards for services products and the further development of business-related services in regional and local markets;

6. LOOKS FORWARD to the development of a well targeted Action Plan for business-related services and accompanying timetable and WELCOMES the intention of the Commission to present this early in 2005 to complement the measures contained in the proposed Framework Directive on Services."

COMMUNITY PATENT

The Council held extensive discussions on a limited number of questions still outstanding with regard to the proposal for a Council Regulation on the Community patent. In the absence of agreement on these issues, the Presidency concluded that it would reflect on how to proceed further.

ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS

The Council took note of information from the Presidency that the European Parliament voted on 9 March 2004 amendments to the proposal for a Directive on measures and procedures to ensure the enforcement of intellectual property rights. The Council will adopt the Directive as amended by Parliament in the next few weeks.

The Council welcomed the step forward which this first-reading agreement represents in the fight against piracy and counterfeiting and underlined that the new Directive will constitute a key element of the EU legal framework in the area of intellectual property rights and in the internal market at large.
EUROPE AND BASIC RESEARCH – Council Conclusions

Following an exchange of views on Europe and basic research during which it was agreed to return to this issue following further input from the Commission, the Council adopted the Conclusions set out below:

“THE COUNCIL OF THE EUROPEAN UNION,

1. RECALLING
   – The Commission Communication of January 2000 on the European Research Area;
   – The conclusions of the Lisbon European Council of March 2000 which set a strategic goal for the European Union to become the most competitive knowledge-based economy by 2010;
   – Council Resolutions of 15 June 2000 on Establishing a European area of research and innovation and of 16 November 2000 on Making a reality of the European area of research and innovation;
   – Council conclusions of 26 November 2002 on progress made in the development of the European Research Area (ERA) and on providing it with new momentum;
   – The Commission Communication of 5 February 2003 on The role of the universities in the Europe of knowledge which examines the place and role of the European universities in society and in the knowledge economy;
   – The Council resolution of 22 September 2003 on "Investing in research for European Growth and Competitiveness" which recognises that fundamental research is crucial for the sustainable development of the knowledge-based society;
   – The Resolution of the European Parliament of 18 November 2003 on Investing in research;

2. NOTES:
   – The role of international and European scientific cooperation frameworks in promoting basic research, and the recent work undertaken by various high level and scientific groups on furthering excellence of basic research in Europe;
   – The High Level Dublin Castle Symposium, held on 16/17 February 2004, on “Europe's Search for excellence in basic research” which, inter alia, recognised that there is a clear challenge for Europe to enhance its levels of creativity and excellence in basic research in the context of global competition and called for a European initiative to promote excellence in basic research; NOTES that the symposium took the view that such an initiative would require specific funding within the 7th Framework Programme, and could imply a new mechanism which should have the full confidence and involvement of the scientific communities and be characterised by minimum bureaucracy;

3. ACKNOWLEDGES that the main objective of high quality basic research is the development and enhancement of knowledge, thereby contributing to the advancement of science and to promoting sustainable economic development, competitiveness and employment in the knowledge-based economy; ACKNOWLEDGES also the positive impact that high quality basic research will have on society as a whole; REAFFIRMS therefore the importance of reinforcing support, also with the involvement of the private sector, for basic research in the context of the European Research and Innovation Area;
4. WELCOMES the fact that the Commission, in its Communication "Europe and Basic research", examines the impact of basic research on the competitiveness, growth and quality of life in Europe and puts forward suggestions for exploring the means of strengthening Europe's performance in basic research;

5. RECOGNISES the need to:
   − continue to work to improve the climate for the development of science and research careers in Europe and the key role of basic research in training researchers;
   − stimulate research excellence of world class quality in Europe in a wide range of sectors and disciplines, including social sciences and humanities, by encouraging more competition in science-driven research at European level selected on the basis of excellence;
   − improve the exploitation of results of basic research by supporting transfer of knowledge between researchers, centres of excellence and enterprises, with particular reference to the role of universities, as well as within society as a whole;
   − coordinate, on a voluntary basis, resources, approaches and instruments and to encourage cooperation with the best in the world to strengthen basic research at the European level, and to add value to existing national approaches wherever possible;

6. ACKNOWLEDGES therefore the need, in the context of the preparation of the next research framework programme and taking into account an analysis of the respective merits of existing national approaches and a possible European initiative, to examine the case for specific funding within that Programme to support basic research of the highest quality. At the same time, an appropriate balance should be maintained with other priorities, approaches and activities in research, technological development and innovation;

7. NOTES the intention of the Commission to bring forward, by May 2004, an initiative on operational mechanisms which should add value to existing national approaches and provide a European dimension, with the objective of reinforcing the creativity and excellence of basic research in Europe, through encouraging more competition at the highest European level amongst individual research teams while enhancing cooperation between national programmes.”

**SPACE POLICY**

The Council had an exchange of views on European space policy on the basis of the Commission White Paper of November 2003, which outlines a detailed set of space policy actions and also suggests a road map for a "European Space Programme", as well as on the Commission’s Communication on GMES (Global monitoring for environment and security).

Bearing in mind the need to have a coordinated approach by the Community, European Space Agency (ESA) and Member States in 2004, as outlined in the Commission’s White Paper, Ministers examined the following questions:

1. the general approach and priorities of the White Paper and the respective roles and responsibilities of different actors, in particular the Community and ESA in the context of the EC/ESA Framework Agreement;
2. the time-scale of and approach to further development of space policies in the short term which could be discussed and undertaken jointly with the ESA, possibly via an informal "Space Council";

3. the aspects or lines of action of the White Paper on which the Commission could begin work during 2004;

4. the approach the Commission should have to ongoing and future space projects included under the Quick Start initiative, such as GMES (Global monitoring for environment and security).

Ministers agreed to continue considering the issues raised in the Commission’s Communications, with the assistance of the High Level Group set up under the EC/ESA Framework Agreement, with a view to holding an informal joint meeting of the EU/ESA Council before the end of 2004.
ITEMS APPROVED WITHOUT DEBATE

INTERNAL MARKET

Detergents – Public Deliberation

The Council approved the second-reading amendments of the European Parliament on the compromise package concerning the proposal for a Regulation on Detergents, with a view to the adoption of this act in the form of an amended common position (10595/03 + 16147/03).

The Regulation aims at modernising existing EU legislation on detergents to further protect the environment, more particularly as it improves requirements for the biodegradability of surfactants.

EXTERNAL RELATIONS

West Bank and Gaza Strip – Financial and technical co-operation – Public Deliberation

The Council adopted a Regulation of the European Parliament and the Council amending Regulation No 1734/94 on financial and technical co-operation with the West Bank and the Gaza Strip, as amended by the Parliament at first reading (PE-CONS 3619/04).

Modifications to Regulation No 1734/94 take account of developments, in particular with regard to implementation of the "roadmap" for peace in the Middle East, with the aim of preventing any further deterioration of the Palestinian economy.

TRADE POLICY

Textile quotas – EU enlargement

The Council adopted a Regulation adjusting quantitative limits set under Regulation No 3030/93 for imports of textile and clothing products in order to take account of the EU’s enlargement to include ten new Member States as from 1 May (6046/1/04).

Adjustment of the quotas takes account of average imports into the new Member States over the last three years.

FISHERIES

Accession of the Community to a Convention - request for assent.

The Council decided to request the assent of the European Parliament concerning the accession of the Community to the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (6132/1/04). The assent of the European Parliament, on the basis of Article 300(2) and (3) of the Treaty, is needed to enable the Council Decision on the accession of the Community to the Convention to be adopted at a later stage.
**TRANSPORT**

**Aviation - Passenger Name Record (PNR)**

The Council approved the submission to the ICAO Facilitation Division of a Working Paper (7236/04) on behalf of the European Community and its Member States. As one element in the wider context of the issue of government access to Passenger Name Record data, the working paper addresses the following aspects:

− the scope of data that may be used for aviation security and border control purposes;
− the practices that may be employed for the collection, processing, storage and transfer of such data;
− the technical implications in respect of the systems employed for the capture, processing, storage, and transfer of such data.

**HEALTH**

**Pharmaceuticals – Review of Community legislation* - Public deliberation**

The Council adopted a package of Community legislation on pharmaceuticals updating existing rules with the aim of responding to technical and scientific innovations whilst maintaining a high level of health protection and continuing to ensure the proper functioning of the EU’s internal market in the pharmaceuticals sector (16151/03 + 16157/03).

The Council adopted the following texts, as amended by the European Parliament at second reading:

- Regulation on authorisation and supervision of medicinal products for human and veterinary use and on the European Medicines Agency (replacing Regulation No 2309/03) \(^1\);\(^2\)
- Directive on the Community code relating to medicinal products for human use (amending Directive 2001/83/EC) \(^3\);\(^2\)
- Directive on the Community code relating to medicinal products for veterinary use (amending Directive 2001/82/EC) \(^4\);\(^2\)

The new legislation is particularly aimed at:

− responding to innovations, such as the development of new substances and therapies;
− enhancing the competitiveness of Europe's pharmaceutical industry, particularly small and medium-sized enterprises in the context of globalisation;
− ensuring the proper operation of the internal market, in particular in view of the EU’s enlargement on 1 May;
− simplifying authorisation procedures and improving transparency;

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2. Adopted by qualified majority, with the Belgian delegation voting against.
while ensuring a high level of health protection through the quality, safety and efficacy of medicinal products;

**INSTITUTIONAL AFFAIRS**

**European Commission – Nomination of Stavros Dimas to succeed Anna Diamantopoulou**

The Council adopted a Decision nominating Mr Stavros Dimas as Commissioner until 31 October, to succeed Anna Diamantopoulou who resigned on 10 March (7235/04).

Mr Dimas was designated Commissioner by the Greek government following Ms Diamantopoulou's election to the Greek Parliament.

**APPOINTMENTS**

**Office for Harmonisation in the Internal Market**

In the light of the Administrative Board's proposal and the comments of the President of the Office for Harmonisation in the Internal Market (Trade Mark and Designs), the Council adopted the Decision renewing the term of office of Mr von Mühlendahl as Vice-President of the Office (6807/1/04).
COUNCIL OF
THE EUROPEAN UNION

Brussels, 7 April 2004

Interinstitutional File:
2003/0024 (COD)

8285/04

PI 36
CODEC 529
OC 368

"I/A" ITEM NOTE
from: General Secretariat of the Council
to: Permanent Representatives Committee (Part 1)/Council
No. prev. doc.: 7012/04 CODEC 308 PI 31 CULT 19
No. Cion prop.: 6777/03 PI 19 CULT 17 CODEC 204
Subject: Adoption of a Directive of the European Parliament and of the Council on measures and procedures to ensure the enforcement of intellectual property rights

COMMON GUIDELINES
Deadline for consultation: 23 April 2004


2. The Economic and Social Committee delivered its Opinion on 29 October 2003.

3. At its meeting on 11/13 February 2004, the Permanent Representatives Committee (Part 1), while awaiting the outcome of the first reading in the European Parliament, reached broad agreement on a number of amendments to the Commission proposal, as set out in 6376/04 PI 21 CODEC 219, on the understanding that if these amendments were to be accepted by the European Parliament as a package, the Permanent Representatives Committee would recommend to the Council to adopt the proposed Directive at first reading.

1 OJ C 32, 5.2.2004, p. 15.
4. The European Parliament concluded its first reading on 9 March 2004 by adopting 45 amendments to the Commission proposal (7012/04 CODEC 308 PI 31 CULT 19), which correspond to the above-mentioned text agreed upon by the Permanent Representatives Committee.

5. The Permanent Representatives Committee (Part 1) is therefore invited to suggest to the Council, as an A item of one of its forthcoming meetings, to:

- approve the amendments proposed by the European Parliament at first reading and adopt the proposed Directive as amended, the text of which, following scrutiny by the Legal/Linguistic experts, appears in document PE-CONS 3636/04 PI 33 CODEC 354 OC 224, with Austria and Italy abstaining;

- enter into its Minutes the statement contained in the Addendum to this Note.
ADDENDUM to "I/A" ITEM NOTE

from: General Secretariat of the Council

to: Permanent Representatives Committee (Part 1)/Council

No. prev. doc.: 7012/04 CODEC 308 PI 31 CULT 19
No. Cion prop.: 6777/03 PI 19 CULT 17 CODEC 204

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

COMMON GUIDELINES

Deadline for consultation: 23 April 2004

Delegations will find attached the statement to be entered in the minutes of the Council meeting at which the above Directive will be adopted.
Statement by the Commission

“The Commission considers that effective action against counterfeit and piracy requires criminal sanctions for serious infringements which are intentional and committed for commercial purposes. It also considers, in line with Article 20 of its original proposal that where necessary to achieve a Community objective, such measures may be adopted under the powers conferred for the purposes of achieving the aims set out in Article 95 of the Treaty establishing the European Community. Consequently, the Commission will examine the possibility to propose in due course further measures providing for criminal sanctions in this field.”
COUNCIL OF THE EUROPEAN UNION  
Brussels, 22 April 2004

8285/04
COR 1

Corrigendum to "I/A" Item Note
from: General Secretariat of the Council
to: Permanent Representatives Committee (Part 1)/Council

No. prev. doc. : 7012/04 CODEC 308 PI 31 CULT 19
No. Cion prop. : 6777/03 PI 19 CULT 17 CODEC 204

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

COMMON GUIDELINES
Deadline for consultation: 23 April 2004

On page 2, point 5 should read as follows:

"5. The Permanent Representatives Committee (Part 1) is therefore invited to suggest to the Council, as an A item of one of its forthcoming meetings, to:

- approve the amendments proposed by the European Parliament at first reading and adopt the proposed Directive as amended, the text of which, following scrutiny by the Legal/Linguistic experts, appears in document PE-CONS 3636/04 PI 33 CODEC 354 OC 224 + COR 1(sv), with Austria, Belgium and Italy abstaining;

- enter into its Minutes the statement contained in the Addendum to this Note."
2578th Council meeting
- Agriculture and Fisheries -
Luxembourg, 26 April 2004

President: Mr Joe WALSH, T.D.
Minister for Agriculture and Food of Ireland

Internet: http://ue.eu.int/
E-mail: press.office@consilium.eu.int

For further information call 32 2 285 95 89 – 32 2 285 63 19
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1. Where declarations, conclusions or resolutions have been formally adopted by the Council, this is indicated in the heading for the item concerned and the text is placed between quotation marks.
2. The documents whose references are given in the text are available on the Council's Internet site http://ue.eu.int.
3. Acts adopted with statements for the Council minutes which may be released to the public are indicated by an asterisk; these statements are available on the above mentioned Council Internet site or may be obtained from the Press Office.
PARTICIPANTS

The Governments of the Member States and the European Commission were represented as follows:

**Belgium:**
Ms Sabine LARUELLE Minister for Small and Medium-Sized Businesses, the Liberal Professions and the Self-Employed and Agriculture

**Denmark:**
Ms Mariann Fischer BOEL Minister for Food

**Germany:**
Ms Renate KÜNAST Federal Minister for Consumer Protection, Food and Agriculture

**Greece:**
Mr Savvas TSITOURIDIS Minister for Rural Development and Food

**Spain:**
Ms Elena ESPINOSA MANGANA Minister for Agriculture, Fisheries and Food

**France:**
Mr Hervé GAYMARD Minister for Agriculture, Food, Fisheries and Rural Affairs

**Ireland:**
Mr John MALONE Secretary General, Department of Agriculture and Food

**Italy:**
Mr Paolo BONAZZA-SCARPA State Secretary

**Luxembourg:**
Mr Fernand BODEN Minister for Agriculture, Viticulture and Rural Development, Minister for Small and Medium-sized Businesses, the Liberal Professions and the Self-Employed, Tourism and Housing

**Netherlands:**
Mr Cornelis Pieter VEERMAN Minister for Agriculture, Nature and Food Quality

**Austria:**
Mr Joseph PRÖLL Federal Minister for Agriculture, Forestry, the Environment and Water Management

**Portugal:**
Mr Luís FRAZÃO GOMES State Secretary

**Finland:**
Mr Juha KORKEAOJA Minister for Agriculture and Forestry

**Sweden:**
Ms Ann-Christin NYKVIST Minister for Agriculture

**United Kingdom:**
Mr Ben BRADSHAW State Secretary

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**Commission:**
Mr David BYRNE Member

8350/04 (Presse 180)
The Governments of the acceding States were represented as follows:

**Czech Republic:**
Mr Zdeněk RUŽIČKA
Deputy Minister for Agriculture

**Estonia:**
Mr Margus RAJUOJA
Deputy Head of Mission

**Cyprus:**
Mr Michael CONSTANTINIDES
Permanent Secretary

**Latvia:**
Mr Martins ROZE
Minister for Agriculture

**Lithuania:**
Mr Jeronimas KRAUJELIS
Minister for Agriculture

**Hungary:**
Mr Ferenc NYUJTÓ
Deputy State Secretary, Ministry of Agriculture and Regional Development

**Malta:**
Mr Francis AGIUS
Parliamentary Secretary

**Poland:**
Ms Ewa SYNOWIEC
Deputy Head of Mission

**Slovenia:**
Mr Milan POGACNIK
Minister

**Slovakia:**
Mr Juraj NOCIAR
Deputy Head of Mission
ITEMS DEBATED

ANIMAL WELFARE DURING TRANSPORT

After several hours in plenary session and after bilateral meetings were held in the margins of the meeting, the Council, having discussed the proposal for a Regulation on the protection of animals during transport and related operations (11794/03), agreed to leave this file.

The Presidency concluded that there had not been sufficient movement towards reaching political agreement by qualified majority on the subject.

GENETICALLY MODIFIED MAIZE BT 11

The Council examined the proposal for a Council Decision (5916/04) authorising the placing on the market of sweet corn from genetically modified maize line Bt 11 as a novel food or novel food ingredient under Regulation (EC) No 258/97 of the European Parliament and of the Council.

In January 2004 the Commission submitted this proposal to the Council following the absence of a favourable opinion from the Standing Committee on the Food Chain on authorising Bt11 sweet corn as a novel food.

The Presidency took note that the positions adopted at the level of the Standing Committee had not changed sufficiently to allow a decision to be reached in Council on the Commission's proposal.

OTHER BUSINESS

– Dioxin content

The Danish delegation drew the attention of the Council and the Commission to the precautionary measures taken by the Danish Government concerning Baltic salmon following the discovery of dioxin content in excess of Community standards. Denmark introduced a fishing and marketing ban on Baltic salmon on 31 March 2004. The Danish delegation expressed the wish to have further details from the Commission concerning the measures taken at Community level.

Commissioner Byrne, having thanked the Danish delegation, reminded the delegations that his Institution had already expressed its concerns as regards the presence of dioxin in food and feed. He stressed that maximum levels had already been set for food, feed and fish since 2001 and that limits had already been set to the presence of dioxin in order to protect public health. He encouraged acceding countries to submit as soon as possible their data concerning Baltic salmon.

– Genetically Modified Organisms in seed (8689/04)

The Danish and Austrian delegations, supported by the Luxembourg delegation, stressed the need for the Community to establish clear rules for GMOs in seed and called upon the Commission to put forward as soon as possible a new proposal with respect to the labelling and content of GMOs in seed, in which the thresholds would be set at detection level (0,1%). These delegations expressed their concerns regarding the various threshold values to be set for seed and the need for the Commission to consult national experts prior to its decision.
The German delegation indicated its concerns following the considerable reduction of conventional crops in countries where GM crops had been introduced and wanted that fair and proper rules to be implemented very soon. The Italian delegation pointed to the need to have a clear definition as regards the adventitious presence of GM seed and also urged the Commission to present a proposal setting low tolerance thresholds. These thresholds could be changed, if necessary, in the next years depending on how national legislation performed.

Commissioner Byrne indicated that his Institution had been working on establishing thresholds regarding the adventitious presence of GMO content in seeds, and that a draft decision on this matter, in the framework of Directive 2001/18/EC on the deliberate release of GMOs, would be submitted in the coming weeks to a Committee for initial examination.

**Application of Community legislation in acceding countries**

The Slovak delegation, supported by the Polish and the Czech delegations, drew the attention of the Council and the Commission to the need to have a limited number of products covered by a list set out in Commission Regulation (EC) No 1972/2003 on transitional measures to be adopted in respect of trade in agricultural products of the acceding countries. This Regulation provides in particular for a list of surplus stocks at 1 May 2004 on which the new Member States should levy charges to ensure that these products do not qualify for a double export refund, before 1 May 2004 if originating in the European Union of 15 Member States and after 1 May 2004, the date of enlargement, if exported from a new Member State. These delegations, supported by other acceding countries, with some of the Member States showing a degree of understanding, had already raised this issue at the Agriculture and Fisheries Council on 17 November 2003 (14387/03), underlining the administrative burden and extra costs involved in managing this list of surplus stocks.

Commissioner Byrne indicated he would transmit this request to Commissioner Fischler for further examination, as this issue came under the latter’s scope of competence.
ITEMS APPROVED WITHOUT DEBATE

AGRICULTURE

Ungulate animals


The aim of the proposal was to lay down animal health rules for the importation into the Community of certain live ungulate animals, and to amend Directives 90/426/EEC and 92/65/EEC. This was to be done in the follow-up to the outbreaks of disease within the European Union, in particular foot-and-mouth disease (FMD) as well as classical swine fever (CSF). The proposal would bring together the import conditions and requirements for FMD susceptible species currently contained in two separate Directives – one covering domestic species (Council Directive 72/462/EEC) and the other covering wild species (Council Directive 92/65/EEC). Directive 90/426/EEC and Directive 92/65/EEC should therefore be amended accordingly.

The final text of the Directive, to be transposed into national law 18 months after its date of entry into force, took on board several amendments of the European Parliament, including the extension of the scope of the Directive so as to cover not only imports, but also the transit of live ungulates in the Community (Article 1). Derogations as regards imports from authorised third countries where certain diseases are present and/or vaccination against those diseases is carried out should be made only on a case-by-case basis.

EC/Switzerland Agreement on trade in agricultural products

The Council adopted by means of a Decision a Community position on the amendment of Appendix 5 to Annex 11 to the Agreement between the European Community and the Swiss Confederation on trade in agricultural products. This amendment introduces a change following a decision of the Joint Veterinary Committee as regards the rules for animals sent for grazing in border areas (7245/04).

Beekeeping*

The Council unanimously adopted a Regulation on actions in the field of beekeeping (5637/04 + 8006/04 + ADD 1 + 6346/04). The aim of the Regulation is to improve the marketing of bee products and the conditions of production. This will be done through 3-year programmes with measures including the fight against bee disease (varroasis), and scientific research for improving the quality. The Community budget amounts to EUR 16,5 million and 50% of the expenditure will be co financed.
Genetic resources*

The Council adopted a Regulation establishing a Community programme on the conservation, characterisation, collection and utilisation of genetic resources in agriculture (5124/04 + 6764/04 + 8203/04).

The aims of the proposal are to:

♦ finance measures to promote the conservation, characterisation, collection and utilisation of genetic resources in agriculture, allowing for a wider coverage of plant and animal diversity and, at the same time, helping implement the Biodiversity Action Plan for Agriculture, with particular emphasis on complementing the scope (as regards beneficiaries and/or eligible actions for funding) of the "Rural Development" Council Regulation (EC) No 1257/1999,

♦ promote the exchange of information and close co-ordination between the Member States and between the Member States and the Commission, with regard to the conservation and sustainable use of genetic resources in agriculture, in line with the requirements and needs of the Common Agricultural Policy,

♦ facilitate co-ordination in the field of international undertakings on genetic resources in agriculture, in particular within the Convention on Biological Diversity, the International Treaty on Plant Genetic Resources for Food and Agriculture and the FAO’s Global Plan of Action for the Conservation and Sustainable Utilisation of Plant Genetic Resources for Food and Agriculture, since the conservation and sustainable use of genetic resources in agriculture are essential to the sustainable development of agricultural production and of rural areas.

Sugar


These guaranteed prices for preferential sugar with the ACP States and the Republic of India are set at EUR 52.37/100 kilograms for raw sugar and EUR 64.65/100 kilograms for white sugar.

Pesticides - Public deliberation*

The Council reached political agreement on the proposal for a Regulation on maximum residue levels of pesticides (7635/03 + 8270/04 ADD 1 REV 1 + 8683/04 ADD 1).

The purpose of the Regulation is to introduce a system establishing a Community maximum level (varying in the light of the toxicity of the pesticide) for pesticide in products of animal and plant origin. The proposal would simplify the current system by replacing the existing system of national authorisation, after a period of transition, with a Community procedure of authorisation by the European Food Safety Authority (EFSA) on the basis of risk assessment. The Regulation will facilitate trade between Member States and replace four Directives with a single Regulation in the pesticide residue sector. The Regulation also fixes a maximum "default" limit for unauthorised use of pesticide (e.g. inadvertent use).
The role of the European Food Safety Authority (EFSA) will be to provide scientific evaluation work and the setting of Maximum Residue Levels for pesticides (MRLs). At technical level however, a mechanism is envisaged in which Member States would perform a preliminary evaluation of MRL applications, in line with current procedures under Directive 91/414/EEC. The Commission will take the opinion of EFSA on temporary MRLs into account, where relevant, when setting temporary MRLs.

**Official food and feed controls* - Public deliberation**

The Council adopted at first reading, under the codecision procedure, a Regulation on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules (3632/04 + 7306/04 ADD 1 + ADD 2).

This Regulation completes the first package of the food and feed hygiene review of Community legislation. It lays down general rules for the performance of official controls to verify compliance with rules aiming, particular, at preventing, eliminating or reducing to acceptable levels risks to humans and animals and guaranteeing fair practices in feed and food trade and protecting consumer interests, including feed and food labelling and other forms of consumer information. The Regulation establishes official controls at all stage, underlines the responsibility and training of competent staff in performing official controls, sets the same procedures for controls on food and feed from third countries, and establishes the financing of the official controls by minimum rates of fees and charges collected by Member States.

**Feed hygiene requirements* - Public deliberation**

The Council reached political agreement on a Regulation of the European Parliament and of the Council laying down requirements for feed hygiene (7522/04, 8323/2/04 ADD 1).

**Agricultural holdings after enlargement - Public deliberation**

The Council reached political agreement on a Regulation of the European Parliament and of the Council amending Council Regulation (EEC) No 571/88 on the organisation of Community surveys on the structure of agricultural holdings after enlargement (8307/04, 8517/04). This agreement incorporates the amendments of the European Parliament. The Regulation sets the maximum amounts of the Community contribution to be made towards the expenses incurred for the 2005 and 2007 surveys for the ten acceding countries and also sets the financial framework for these countries at EUR 43.7 million for the period 2004-2006.

**FISHERIES**

**EEC/Guinea Bissau fishing Agreement**

The Council adopted a Regulation on the conclusion of an Agreement between the European Economic Community and the Republic of Guinea Bissau on fishing off the coast of Guinea Bissau for the period 16 June 2001 to 15 June 2006 (5 years) and setting the terms for financial support to Guinea Bissau in the fisheries sector (6912/04 + 13625/03).
The Regulation provides fishing opportunities for five Member States (Italy, France, Greece, Portugal and Spain) as regards shrimps (4 400 gross registered tonnes), fin-fish (4 400 gross registered tonnes), tuna seiners (40 vessels), surface longliners and pole and line tuna vessels (30 vessels).

The financial compensation will amount to EUR be 7 260 000/year.

**Fishing Convention**

The Council adopted a Decision on the accession of the Community to the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (5209/04, 6131/04).

The objective of the Convention is to ensure, through effective management, the long-term conservation and sustainable use of highly migratory fish stocks in the western and central Pacific Ocean in accordance with the 1982 United Nations Convention on the Law of the Sea (UNCLOS) and the 1995 UN Fish Stocks Agreement (UNFSA). The area of competence of the WCPFC accounts for 60% of world tuna resources.

This Decision will enable the Community to sit at the session of the Western and Central Pacific Fisheries Commission (WCPFC).

**EEC/Republic of Guinea fishing Agreement**

The Council adopted a Regulation on the conclusion of a five-year Protocol (2004-2008) defining the fishing opportunities for Spain, Portugal, Greece, France and Italy for fin-fish and cephalod fishing, shrimp fishing, tuna seiners, pole-and-line tuna vessels, surface longliners (15999/03, 6845/04).

The financial contribution amounts to EUR 3 400 000 in 2004, comprising EUR 2 000 000 in financial compensation and EUR 1 400 000 for measures aimed at achieving objectives associated with the sustainable management of Guinean fisheries resources. These amounts may be increased in 2005 up to a maximum of EUR 3 825 000 and in 2006 up to a maximum of EUR 4 250 000, in proportion to the abovementioned increases in fishing opportunities.

**Migratory species and fish stocks**

Fishery resources in the Mediterranean Sea: accession of Malta*

The Council adopted a Regulation concerning management measures for the sustainable exploitation of fishery resources in the Mediterranean Sea with a view to the accession of Malta to the European Union (13406/03, 8163/04 ADD 1 + 8162/04). The Regulation introduces conservation measures in the 25-mile management zone around Malta in accordance with the guidelines fixed in the 2003 Treaty of Accession to the European Union. These derogations concern the maximum size of vessels and the fishing capacity of trawlers. Other provisions prohibit the fishing of dolphin in the management zone.

Catches of cetaceans *

The Council formally adopted the Regulation laying down measures concerning incidental catches of cetaceans in fisheries, after having reached a political compromise by a qualified majority (see 7125/04 for details of the compromise), the Italian and Spanish delegations indicating their intention to vote against (7878/04 ADD 1 - ADD 4, 8621/04, 7825/04).

ENERGY

Security of natural gas supply*

The Council adopted a Directive establishing measures to safeguard an adequate level for the security of gas supply and contributing to the proper functioning of the internal gas market (6120/04 + 8669/1/04).

The Directive establishes a common framework within which Member States will define general, transparent and non-discriminatory security of supply policies compatible with the requirements of a competitive internal gas market, clarify the general roles and responsibilities of the different market players and implement specific non-discriminatory procedures to safeguard security of gas supply.

The Directive will enter into force on the twentieth day following that of its publication in the Official Journal of the European Union. Member States will bring into force the laws, regulations and administrative provisions necessary to comply with the Directive two years after the date of entry into force of the Directive.

INTERNAL MARKET

European Community - United Nations Economic Commission for Europe (UN/ECE)

The Council adopted the EC position on the UN/ECE draft Regulation concerning the uniform prescriptions applicable to the approval of internal combustion engines to be installed in agricultural and forestry tractors and in non-road mobile machinery, with regard to their net power, net torque and specific fuel consumption (5924/04).
The draft Regulation is aimed at abolishing the technical barriers to trade in motor vehicles between the Contracting Parties as far as these components are concerned, while ensuring a high level of safety and environmental protection. The Community, represented by the Commission, should vote in favour of the draft Regulation, during the vote at the meeting of the Administrative Committee at a forthcoming meeting of the World Forum for Harmonisation of Vehicle Regulations of the UN/ECE.

The Council also adopted the EC position on the UN/ECE draft Regulation on uniform prescriptions concerning the approval of cornering lamps for power-driven vehicles (5925/04).

The draft Regulation is aimed at establishing harmonised technical provisions to avoid the creation of technical barriers to trade in motor vehicles between the Contracting Parties as far as these components are concerned, while ensuring a high level of safety and environmental protection. The Community, represented by the Commission, should vote in favour of the draft Regulation during the vote at the meeting of the Administrative Committee at a forthcoming meeting of the World Forum for Harmonisation of Vehicle Regulations of the UN/ECE.

Civil liability in respect of the use of motor vehicles - Public deliberation

The Council adopted the common position on the draft Directive on insurance against civil liability in respect of the use of motor vehicles (16182/03). The objective of the proposal is to update existing provisions in the field of motor vehicle insurance.

The common position adopted by the Council is fully in line with the main objective of the Commission's proposal. Although certain provisions take greater account of national options, the Directive will fulfil the aim of simplifying administrative provisions in a more efficient internal market for motor vehicle insurance, while at the same time taking full account of the interest of better protection for consumers and potential victims.

The Council has furthermore been in a position to accept some of the key EP amendments, at least in part or in substance, in an effort to meet Parliament's concerns and to follow good legislative practice on a number of important points.

Intellectual property rights* - Public deliberation

The Council, by approving the European Parliament's first reading amendments, adopted the proposed Directive as amended, with Austria and Italy abstaining, on measures and procedures to ensure the enforcement of intellectual property rights (PE-CONS 3636/04).

This Directive, the objective of which is to approximate legislative systems so as to ensure a high, equivalent and homogeneous level of protection in the Internal Market, will enter into force on the twentieth day following that of its publication in the Official Journal of the European Union. Member States will bring into force the laws, regulations and administrative provisions necessary to comply with the Directive twenty-four months after the date of its adoption.
TRANSPORT

Second Railway Package - Public deliberation

The Council adopted the so-called "Second Railway package" consisting of the:

- Directive on safety on the Community's railways and amending Council Directive 95/18/EC on the licensing of railway undertakings and Directive 2001/14/EC on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification, with the Belgian and Luxembourg delegations voting against (PE-CONS 3638/04);
- Directive amending Council Directive 96/48/EC and Directive 2001/16/EC on the interoperability of the trans-European railway system, with the Belgian and Luxembourg delegations voting against (PE-CONS 3639/04);
- Regulation establishing a European Railway Agency, with the Belgian and Luxembourg delegations voting against (PE-CONS 3640/04);

The legislative package was adopted in accordance with the joint texts arrived at by the Conciliation Committee at its meeting on 23 March 2004. It aims to revitalise the European railway sector and further complete the internal market for both service providers and manufacturers. Boosting the competitiveness of this mode of transport, it should contribute to the rebalancing of the modal split - particularly in the field of freight transport - with its consequent positive effects on the reduction of both congestion and pollution. In order to perform the highly technical and complex tasks of designing the tools, a European pool of expertise in the form of a European Railway Agency would have a purely advisory function.

RESEARCH

Euratom / Enlargement

In order to take account of the enlargement of the European Union, the Council adopted the Decision amending Decision No 2002/668/Euratom to increase the financial reference amount for the implementation of the sixth framework programme for the period 2002 to 2006 to EUR 1 352 million (7443/04).

TRADE POLICY

Antidumping – Ukraine - Steel ropes and cables from Moldova

On 22 April the Council adopted, by written procedure, a Regulation extending, to imports of steel ropes and cables from Moldova, an anti-dumping duty imposed by Regulation No 1796/1999 on imports of steel ropes and cables from Ukraine (7976/04).
CULTURE

Community programmes supporting European audiovisual works and industry - Public deliberation


The MEDIA-Plus programme is aimed at encouraging the development, distribution and promotion of European audiovisual works. The MEDIA-Training programme is a training programme for European audiovisual industry professionals.

New MEDIA-Plus and MEDIA-Training programmes are planned to start in 2007.

ENVIRONMENT

Electrical and electronic equipment waste - temporary derogations for acceding countries

The Council adopted a Decision allowing Cyprus, Malta and Poland to extend the time-limits provided for by Directive 2002/96/EC on waste electrical and electronic equipment (8000/04).

Acceding countries will benefit from an extra period of 24 months to ensure a rate of separate collection of electrical and electronic equipment waste and to attain minimum targets for waste recovery and recycling.

Elimination of persistent organic pollutants* - Public deliberation


The Regulation establishes the legal framework for the implementation of the Stockholm Convention and for the Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Persistent Organic Pollutants.

It aims to protect human health and environment against chemical pollutants transported across international boundaries far from their sources and which persist in the environment and bio-accumulate through the food web. Taking into account the precautionary principle, rules are established to eliminate the production, placing on the market and use of intentionally produced persistent organic pollutants, and to minimise releases of those substances.
**SOCIAL POLICY**

**Co-ordination of social security systems** - *Public deliberation*

The Council approved the amendments proposed by the European Parliament, at second reading, on a Regulation on the coordination of social security systems. The European Parliament and Council Regulation is therefore deemed to be adopted (15577/6/03 + ADD 1 + 8478/04 + 8548/04 ADD 1).

The Regulation aims to facilitate the free movement of persons within the Community, removing the obstacles resulting from the coexistence of different national social security systems. European citizens should be allowed to move freely, either for study, leisure or professional reasons, without losing social security benefits, in particular family, sickness, maternity and paternity, accident at work, unemployment, invalidity and old age benefits.

The Regulation will replace the system currently in force (Regulation No 1408/71) with a simpler structure, updated concepts and a broader personal and material scope. The reform maintains or improves the current rights of European citizens.

**Health and safety in the workplace - Exposure to carcinogens and mutagens** - *Public deliberation*


The text is a codified version of Directive 90/394/EEC.
of 29 April 2004

on the enforcement
of intellectual property rights

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 95 thereof,

Having regard to the proposal from the Commission,

Having regard to the Opinion of the European Economic and Social Committee ¹,

After consulting the Committee of the Regions,

Acting in accordance with the procedure laid down in Article 251 of the Treaty ²,

¹ OJ C 32, 5.2.2004, p. 15.
Whereas:

(1) The achievement of the Internal Market entails eliminating restrictions on freedom of movement and distortions of competition, while creating an environment conducive to innovation and investment. In this context, the protection of intellectual property is an essential element for the success of the Internal Market. The protection of intellectual property is important not only for promoting innovation and creativity, but also for developing employment and improving competitiveness.

(2) The protection of intellectual property should allow the inventor or creator to derive a legitimate profit from his invention or creation. It should also allow the widest possible dissemination of works, ideas and new know-how. At the same time, it should not hamper freedom of expression, the free movement of information, or the protection of personal data, including on the Internet.

(3) However, without effective means of enforcing intellectual property rights, innovation and creativity are discouraged and investment diminished. It is therefore necessary to ensure that the substantive law on intellectual property, which is nowadays largely part of the acquis communautaire, is applied effectively in the Community. In this respect, the means of enforcing intellectual property rights are of paramount importance for the success of the Internal Market.
(4) At international level, all Member States, as well as the Community itself as regards matters within its competence, are bound by the Agreement on Trade-Related Aspects of Intellectual Property (the "TRIPS Agreement"), approved, as part of the multilateral negotiations of the Uruguay Round, by Council Decision 94/800/EC\(^1\) and concluded in the framework of the World Trade Organisation.

(5) The TRIPS Agreement contains, in particular, provisions on the means of enforcing intellectual property rights, which are common standards applicable at international level and implemented in all Member States. This Directive should not affect Member States’ international obligations, including those under the TRIPS Agreement.

(6) There are also international conventions to which all Member States are parties and which also contain provisions on the means of enforcing intellectual property rights. These include, in particular, the Paris Convention for the Protection of Industrial Property, the Berne Convention for the Protection of Literary and Artistic Works, and the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations.

(7) It emerges from the consultations held by the Commission on this question that, in the Member States, and despite the TRIPS Agreement, there are still major disparities as regards the means of enforcing intellectual property rights. For instance, the arrangements for applying provisional measures, which are used in particular to preserve evidence, the calculation of damages, or the arrangements for applying injunctions, vary widely from one Member State to another. In some Member States, there are no measures, procedures and remedies such as the right of information and the recall, at the infringer's expense, of the infringing goods placed on the market.

(8) The disparities between the systems of the Member States as regards the means of enforcing intellectual property rights are prejudicial to the proper functioning of the Internal Market and make it impossible to ensure that intellectual property rights enjoy an equivalent level of protection throughout the Community. This situation does not promote free movement within the Internal Market or create an environment conducive to healthy competition.
(9) The current disparities also lead to a weakening of the substantive law on intellectual property and to a fragmentation of the Internal Market in this field. This causes a loss of confidence in the Internal Market in business circles, with a consequent reduction in investment in innovation and creation. Infringements of intellectual property rights appear to be increasingly linked to organised crime. Increasing use of the Internet enables pirated products to be distributed instantly around the globe. Effective enforcement of the substantive law on intellectual property should be ensured by specific action at Community level. Approximation of the legislation of the Member States in this field is therefore an essential prerequisite for the proper functioning of the Internal Market.

(10) The objective of this Directive is to approximate legislative systems so as to ensure a high, equivalent and homogeneous level of protection in the Internal Market.

(11) This Directive does not aim to establish harmonised rules for judicial cooperation, jurisdiction, the recognition and enforcement of decisions in civil and commercial matters, or deal with applicable law. There are Community instruments which govern such matters in general terms and are, in principle, equally applicable to intellectual property.
(12) This Directive should not affect the application of the rules of competition, and in particular Articles 81 and 82 of the Treaty. The measures provided for in this Directive should not be used to restrict unduly competition in a manner contrary to the Treaty.

(13) It is necessary to define the scope of this Directive as widely as possible in order to encompass all the intellectual property rights covered by Community provisions in this field and/or by the national law of the Member State concerned. Nevertheless, that requirement does not affect the possibility, on the part of those Member States which so wish, to extend, for internal purposes, the provisions of this Directive to include acts involving unfair competition, including parasitic copies, or similar activities.

(14) The measures provided for in Articles 6(2), 8(1) and 9(2) need to be applied only in respect of acts carried out on a commercial scale. This is without prejudice to the possibility for Member States to apply those measures also in respect of other acts. Acts carried out on a commercial scale are those carried out for direct or indirect economic or commercial advantage; this would normally exclude acts carried out by end-consumers acting in good faith.


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(17) The measures, procedures and remedies provided for in this Directive should be determined in each case in such a manner as to take due account of the specific characteristics of that case, including the specific features of each intellectual property right and, where appropriate, the intentional or unintentional character of the infringement.

(18) The persons entitled to request application of those measures, procedures and remedies should be not only the rightholders but also persons who have a direct interest and legal standing in so far as permitted by and in accordance with the applicable law, which may include professional organisations in charge of the management of those rights or for the defence of the collective and individual interests for which they are responsible.

(19) Since copyright exists from the creation of a work and does not require formal registration, it is appropriate to adopt the rule laid down in Article 15 of the Berne Convention, which establishes the presumption whereby the author of a literary or artistic work is regarded as such if his name appears on the work. A similar presumption should be applied to the owners of related rights since it is often the holder of a related right, such as a phonogram producer, who will seek to defend rights and engage in fighting acts of piracy.
(20) Given that evidence is an element of paramount importance for establishing the infringement of intellectual property rights, it is appropriate to ensure that effective means of presenting, obtaining and preserving evidence are available. The procedures should have regard to the rights of the defence and provide the necessary guarantees, including the protection of confidential information. For infringements committed on a commercial scale it is also important that the courts may order access, where appropriate, to banking, financial or commercial documents under the control of the alleged infringer.

(21) Other measures designed to ensure a high level of protection exist in certain Member States and should be made available in all the Member States. This is the case with the right of information, which allows precise information to be obtained on the origin of the infringing goods or services, the distribution channels and the identity of any third parties involved in the infringement.

(22) It is also essential to provide for provisional measures for the immediate termination of infringements, without awaiting a decision on the substance of the case, while observing the rights of the defence, ensuring the proportionality of the provisional measures as appropriate to the characteristics of the case in question and providing the guarantees needed to cover the costs and the injury caused to the defendant by an unjustified request. Such measures are particularly justified where any delay would cause irreparable harm to the holder of an intellectual property right.
(23) Without prejudice to any other measures, procedures and remedies available, rightholders should have the possibility of applying for an injunction against an intermediary whose services are being used by a third party to infringe the rightholder's industrial property right. The conditions and procedures relating to such injunctions should be left to the national law of the Member States. As far as infringements of copyright and related rights are concerned, a comprehensive level of harmonisation is already provided for in Directive 2001/29/EC. Article 8(3) of Directive 2001/29/EC should therefore not be affected by this Directive.

(24) Depending on the particular case, and if justified by the circumstances, the measures, procedures and remedies to be provided for should include prohibitory measures aimed at preventing further infringements of intellectual property rights. Moreover there should be corrective measures, where appropriate at the expense of the infringer, such as the recall and definitive removal from the channels of commerce, or destruction, of the infringing goods and, in appropriate cases, of the materials and implements principally used in the creation or manufacture of these goods. These corrective measures should take account of the interests of third parties including, in particular, consumers and private parties acting in good faith.
(25) Where an infringement is committed unintentionally and without negligence and where the corrective measures or injunctions provided for by this Directive would be disproportionate, Member States should have the option of providing for the possibility, in appropriate cases, of pecuniary compensation being awarded to the injured party as an alternative measure. However, where the commercial use of counterfeit goods or the supply of services would constitute an infringement of law other than intellectual property law or would be likely to harm consumers, such use or supply should remain prohibited.

(26) With a view to compensating for the prejudice suffered as a result of an infringement committed by an infringer who engaged in an activity in the knowledge, or with reasonable grounds for knowing, that it would give rise to such an infringement, the amount of damages awarded to the rightholder should take account of all appropriate aspects, such as loss of earnings incurred by the rightholder, or unfair profits made by the infringer and, where appropriate, any moral prejudice caused to the rightholder. As an alternative, for example where it would be difficult to determine the amount of the actual prejudice suffered, the amount of the damages might be derived from elements such as the royalties or fees which would have been due if the infringer had requested authorisation to use the intellectual property right in question. The aim is not to introduce an obligation to provide for punitive damages but to allow for compensation based on an objective criterion while taking account of the expenses incurred by the rightholder, such as the costs of identification and research.
(27) To act as a supplementary deterrent to future infringers and to contribute to the awareness of the public at large, it is useful to publicise decisions in intellectual property infringement cases.

(28) In addition to the civil and administrative measures, procedures and remedies provided for under this Directive, criminal sanctions also constitute, in appropriate cases, a means of ensuring the enforcement of intellectual property rights.

(29) Industry should take an active part in the fight against piracy and counterfeiting. The development of codes of conduct in the circles directly affected is a supplementary means of bolstering the regulatory framework. The Member States, in collaboration with the Commission, should encourage the development of codes of conduct in general. Monitoring of the manufacture of optical discs, particularly by means of an identification code embedded in discs produced in the Community, helps to limit infringements of intellectual property rights in this sector, which suffers from piracy on a large scale. However, these technical protection measures should not be misused to protect markets and prevent parallel imports.

(30) In order to facilitate the uniform application of this Directive, it is appropriate to provide for systems of cooperation and the exchange of information between Member States, on the one hand, and between the Member States and the Commission on the other, in particular by creating a network of correspondents designated by the Member States and by providing regular reports assessing the application of this Directive and the effectiveness of the measures taken by the various national bodies.
(31) Since, for the reasons already described, the objective of this Directive can best be achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.

(32) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular, this Directive seeks to ensure full respect for intellectual property, in accordance with Article 17(2) of that Charter,

HAVE ADOPTED THIS DIRECTIVE:
CHAPTER I

Objective and scope

Article 1

Subject-matter

This Directive concerns the measures, procedures and remedies necessary to ensure the enforcement of intellectual property rights. For the purposes of this Directive, the term "intellectual property rights" includes industrial property rights.
Article 2

Scope

1. Without prejudice to the means which are or may be provided for in Community or national legislation, in so far as those means may be more favourable for rightholders, the measures, procedures and remedies provided for by this Directive shall apply, in accordance with Article 3, to any infringement of intellectual property rights as provided for by Community law and/or by the national law of the Member State concerned.

2. This Directive shall be without prejudice to the specific provisions on the enforcement of rights and on exceptions contained in Community legislation concerning copyright and rights related to copyright, notably those found in Directive 91/250/EEC and, in particular, Article 7 thereof or in Directive 2001/29/EC and, in particular, Articles 2 to 6 and Article 8 thereof.
3. This Directive shall not affect:

(a) the Community provisions governing the substantive law on intellectual property, Directive 95/46/EC, Directive 1999/93/EC or Directive 2000/31/EC, in general, and Articles 12 to 15 of Directive 2000/31/EC in particular;

(b) Member States' international obligations and notably the TRIPS Agreement, including those relating to criminal procedures and penalties;

(c) any national provisions in Member States relating to criminal procedures or penalties in respect of infringement of intellectual property rights.
CHAPTER II

Measures, procedures and remedies

Section 1

General provisions

Article 3

General obligation

1. Member States shall provide for the measures, procedures and remedies necessary to ensure the enforcement of the intellectual property rights covered by this Directive. Those measures, procedures and remedies shall be fair and equitable and shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.

2. Those measures, procedures and remedies shall also be effective, proportionate and dissuasive and shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.
Article 4

Persons entitled to apply for the application of the measures, procedures and remedies

1. Member States shall recognise as persons entitled to seek application of the measures, procedures and remedies referred to in this Chapter:

(a) the holders of intellectual property rights, in accordance with the provisions of the applicable law,

(b) all other persons authorised to use those rights, in particular licensees, in so far as permitted by and in accordance with the provisions of the applicable law,

(c) intellectual property collective rights management bodies which are regularly recognised as having a right to represent holders of intellectual property rights, in so far as permitted by and in accordance with the provisions of the applicable law,

(d) professional defence bodies which are regularly recognised as having a right to represent holders of intellectual property rights, in so far as permitted by and in accordance with the provisions of the applicable law.
Article 5

Presumption of authorship or ownership

For the purposes of applying the measures, procedures and remedies provided for in this Directive,

(a) for the author of a literary or artistic work, in the absence of proof to the contrary, to be regarded as such, and consequently to be entitled to institute infringement proceedings, it shall be sufficient for his name to appear on the work in the usual manner;

(b) the provision under (a) shall apply mutatis mutandis to the holders of rights related to copyright with regard to their protected subject matter.
Section 2

Evidence

Article 6

Evidence

1. Member States shall ensure that, on application by a party which has presented reasonably available evidence sufficient to support its claims, and has, in substantiating those claims, specified evidence which lies in the control of the opposing party, the competent judicial authorities may order that such evidence be presented by the opposing party, subject to the protection of confidential information. For the purposes of this paragraph, Member States may provide that a reasonable sample of a substantial number of copies of a work or any other protected object be considered by the competent judicial authorities to constitute reasonable evidence.

2. Under the same conditions, in the case of an infringement committed on a commercial scale Member States shall take such measures as are necessary to enable the competent judicial authorities to order, where appropriate, on application by a party, the communication of banking, financial or commercial documents under the control of the opposing party, subject to the protection of confidential information.
Article 7

Measures for preserving evidence

1. Member States shall ensure that, even before the commencement of proceedings on the merits of the case, the competent judicial authorities may, on application by a party who has presented reasonably available evidence to support his claims that his intellectual property right has been infringed or is about to be infringed, order prompt and effective provisional measures to preserve relevant evidence in respect of the alleged infringement, subject to the protection of confidential information. Such measures may include the detailed description, with or without the taking of samples, or the physical seizure of the infringing goods, and, in appropriate cases, the materials and implements used in the production and/or distribution of these goods and the documents relating thereto. Those measures shall be taken, if necessary without the other party having been heard, in particular where any delay is likely to cause irreparable harm to the rightholder or where there is a demonstrable risk of evidence being destroyed.

Where measures to preserve evidence are adopted without the other party having been heard, the parties affected shall be given notice, without delay after the execution of the measures at the latest. A review, including a right to be heard, shall take place upon request of the parties affected with a view to deciding, within a reasonable period after the notification of the measures, whether the measures shall be modified, revoked or confirmed.
2. Member States shall ensure that the measures to preserve evidence may be subject to the lodging by the applicant of adequate security or an equivalent assurance intended to ensure compensation for any prejudice suffered by the defendant as provided for in paragraph 4.

3. Member States shall ensure that the measures to preserve evidence are revoked or otherwise cease to have effect, upon request of the defendant, without prejudice to the damages which may be claimed, if the applicant does not institute, within a reasonable period, proceedings leading to a decision on the merits of the case before the competent judicial authority, the period to be determined by the judicial authority ordering the measures where the law of a Member State so permits or, in the absence of such determination, within a period not exceeding 20 working days or 31 calendar days, whichever is the longer.

4. Where the measures to preserve evidence are revoked, or where they lapse due to any act or omission by the applicant, or where it is subsequently found that there has been no infringement or threat of infringement of an intellectual property right, the judicial authorities shall have the authority to order the applicant, upon request of the defendant, to provide the defendant appropriate compensation for any injury caused by those measures.

5. Member States may take measures to protect witnesses' identity.
Section 3

Right of information

Article 8

Right of information

1. Member States shall ensure that, in the context of proceedings concerning an infringement of an intellectual property right and in response to a justified and proportionate request of the claimant, the competent judicial authorities may order that information on the origin and distribution networks of the goods or services which infringe an intellectual property right be provided by the infringer and/or any other person who:

(a) was found in possession of the infringing goods on a commercial scale;

(b) was found to be using the infringing services on a commercial scale;
(c) was found to be providing on a commercial scale services used in infringing activities; or

(d) was indicated by the person referred to in point (a), (b) or (c) as being involved in the production, manufacture or distribution of the goods or the provision of the services.

2. The information referred to in paragraph 1 shall, as appropriate, comprise:

(a) the names and addresses of the producers, manufacturers, distributors, suppliers and other previous holders of the goods or services, as well as the intended wholesalers and retailers;

(b) information on the quantities produced, manufactured, delivered, received or ordered, as well as the price obtained for the goods or services in question.
3. Paragraphs 1 and 2 shall apply without prejudice to other statutory provisions which:

(a) grant the rightholder rights to receive fuller information;

(b) govern the use in civil or criminal proceedings of the information communicated pursuant to this Article;

(c) govern responsibility for misuse of the right of information; or

(d) afford an opportunity for refusing to provide information which would force the person referred to in paragraph 1 to admit to his own participation or that of his close relatives in an infringement of an intellectual property right; or

(e) govern the protection of confidentiality of information sources or the processing of personal data.
Section 4
Provisional and precautionary measures

Article 9
Provisional and precautionary measures

1. Member States shall ensure that the judicial authorities may, at the request of the applicant:

(a) issue against the alleged infringer an interlocutory injunction intended to prevent any imminent infringement of an intellectual property right, or to forbid, on a provisional basis and subject, where appropriate, to a recurring penalty payment where provided for by national law, the continuation of the alleged infringements of that right, or to make such continuation subject to the lodging of guarantees intended to ensure the compensation of the rightholder; an interlocutory injunction may also be issued, under the same conditions, against an intermediary whose services are being used by a third party to infringe an intellectual property right; injunctions against intermediaries whose services are used by a third party to infringe a copyright or a related right are covered by Directive 2001/29/EC;
(b) order the seizure or delivery up of the goods suspected of infringing an intellectual property right so as to prevent their entry into or movement within the channels of commerce.

2. In the case of an infringement committed on a commercial scale, the Member States shall ensure that, if the injured party demonstrates circumstances likely to endanger the recovery of damages, the judicial authorities may order the precautionary seizure of the movable and immovable property of the alleged infringer, including the blocking of his bank accounts and other assets. To that end, the competent authorities may order the communication of bank, financial or commercial documents, or appropriate access to the relevant information.

3. The judicial authorities shall, in respect of the measures referred to in paragraphs 1 and 2, have the authority to require the applicant to provide any reasonably available evidence in order to satisfy themselves with a sufficient degree of certainty that the applicant is the rightholder and that the applicant's right is being infringed, or that such infringement is imminent.
4. Member States shall ensure that the provisional measures referred to in paragraphs 1 and 2 may, in appropriate cases, be taken without the defendant having been heard, in particular where any delay would cause irreparable harm to the rightholder. In that event, the parties shall be so informed without delay after the execution of the measures at the latest.

A review, including a right to be heard, shall take place upon request of the defendant with a view to deciding, within a reasonable time after notification of the measures, whether those measures shall be modified, revoked or confirmed.

5. Member States shall ensure that the provisional measures referred to in paragraphs 1 and 2 are revoked or otherwise cease to have effect, upon request of the defendant, if the applicant does not institute, within a reasonable period, proceedings leading to a decision on the merits of the case before the competent judicial authority, the period to be determined by the judicial authority ordering the measures where the law of a Member State so permits or, in the absence of such determination, within a period not exceeding 20 working days or 31 calendar days, whichever is the longer.
6. The competent judicial authorities may make the provisional measures referred to in paragraphs 1 and 2 subject to the lodging by the applicant of adequate security or an equivalent assurance intended to ensure compensation for any prejudice suffered by the defendant as provided for in paragraph 7.

7. Where the provisional measures are revoked or where they lapse due to any act or omission by the applicant, or where it is subsequently found that there has been no infringement or threat of infringement of an intellectual property right, the judicial authorities shall have the authority to order the applicant, upon request of the defendant, to provide the defendant appropriate compensation for any injury caused by those measures.
Section 5
Measures resulting from a decision on the merits of the case

Article 10

Corrective measures

1. Without prejudice to any damages due to the rightholder by reason of the infringement, and without compensation of any sort, Member States shall ensure that the competent judicial authorities may order, at the request of the applicant, that appropriate measures be taken with regard to goods that they have found to be infringing an intellectual property right and, in appropriate cases, with regard to materials and implements principally used in the creation or manufacture of those goods. Such measures shall include:

(a) recall from the channels of commerce,

(b) definitive removal from the channels of commerce, or

(c) destruction.
2. The judicial authorities shall order that those measures be carried out at the expense of the infringer, unless particular reasons are invoked for not doing so.

3. In considering a request for corrective measures, the need for proportionality between the seriousness of the infringement and the remedies ordered as well as the interests of third parties shall be taken into account.
Article 11

Injunctions

Member States shall ensure that, where a judicial decision is taken finding an infringement of an intellectual property right, the judicial authorities may issue against the infringer an injunction aimed at prohibiting the continuation of the infringement. Where provided for by national law, non-compliance with an injunction shall, where appropriate, be subject to a recurring penalty payment, with a view to ensuring compliance. Member States shall also ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe an intellectual property right, without prejudice to Article 8(3) of Directive 2001/29/EC.
Article 12

Alternative measures

Member States may provide that, in appropriate cases and at the request of the person liable to be subject to the measures provided for in this Section, the competent judicial authorities may order pecuniary compensation to be paid to the injured party instead of applying the measures provided for in this Section if that person acted unintentionally and without negligence, if execution of the measures in question would cause him disproportionate harm and if pecuniary compensation to the injured party appears reasonably satisfactory.

Section 6

Damages and legal costs

Article 13

Damages

1. Member States shall ensure that the competent judicial authorities, on application of the injured party, order the infringer who knowingly, or with reasonable grounds to know, engaged in an infringing activity, to pay the rightholder damages appropriate to the actual prejudice suffered by him as a result of the infringement.
When the judicial authorities set the damages:

(a) they shall take into account all appropriate aspects, such as the negative economic consequences, including lost profits, which the injured party has suffered, any unfair profits made by the infringer and, in appropriate cases, elements other than economic factors, such as the moral prejudice caused to the rightholder by the infringement;

or

(b) as an alternative to (a), they may, in appropriate cases, set the damages as a lump sum on the basis of elements such as at least the amount of royalties or fees which would have been due if the infringer had requested authorisation to use the intellectual property right in question.
2. Where the infringer did not knowingly, or with reasonable grounds to know, engage in infringing activity, Member States may lay down that the judicial authorities may order the recovery of profits or the payment of damages, which may be pre-established.

Article 14

Legal costs

Member States shall ensure that reasonable and proportionate legal costs and other expenses incurred by the successful party shall, as a general rule, be borne by the unsuccessful party, unless equity does not allow this.
Section 7
Publicity measures

Article 15

Publication of judicial decisions

Member States shall ensure that, in legal proceedings instituted for infringement of an intellectual property right, the judicial authorities may order, at the request of the applicant and at the expense of the infringer, appropriate measures for the dissemination of the information concerning the decision, including displaying the decision and publishing it in full or in part. Member States may provide for other additional publicity measures which are appropriate to the particular circumstances, including prominent advertising.
CHAPTER III

Sanctions by Member States

Article 16

Sanctions by Member States

Without prejudice to the civil and administrative measures, procedures and remedies laid down by this Directive, Member States may apply other appropriate sanctions in cases where intellectual property rights have been infringed.
CHAPTER IV

Codes of conduct and administrative cooperation

Article 17

Codes of conduct

Member States shall encourage:

(a) the development by trade or professional associations or organisations of codes of conduct at Community level aimed at contributing towards the enforcement of the intellectual property rights, particularly by recommending the use on optical discs of a code enabling the identification of the origin of their manufacture;

(b) the submission to the Commission of draft codes of conduct at national and Community level and of any evaluations of the application of these codes of conduct.
Article 18

Assessment

1. Three years after the date laid down in Article 20(1), each Member State shall submit to the Commission a report on the implementation of this Directive.

On the basis of those reports, the Commission shall draw up a report on the application of this Directive, including an assessment of the effectiveness of the measures taken, as well as an evaluation of its impact on innovation and the development of the information society. That report shall then be transmitted to the European Parliament, the Council and the European Economic and Social Committee. It shall be accompanied, if necessary and in the light of developments in the Community legal order, by proposals for amendments to this Directive.

2. Member States shall provide the Commission with all the aid and assistance it may need when drawing up the report referred to in the second subparagraph of paragraph 1.
Article 19

Exchange of information and correspondents

For the purpose of promoting cooperation, including the exchange of information, among Member States and between Member States and the Commission, each Member State shall designate one or more national correspondents for any question relating to the implementation of the measures provided for by this Directive. It shall communicate the details of the national correspondent(s) to the other Member States and to the Commission.
CHAPTER V

Final provisions

Article 20

Implementation

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by ... *  They shall forthwith inform the Commission thereof.

When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the texts of the provisions of national law which they adopt in the field governed by this Directive.

* Twenty-four months after the date of adoption of this Directive.
Article 21

Entry into force

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

Article 22

Addressees

This Directive is addressed to the Member States.

Done at Strasbourg, 29.4.2004.

For the European Parliament
The President
P. COX

For the Council
The President
M. McDOWELL

(Official Journal of the European Union L 157 of 30 April 2004)

Directive 2004/48/EC should read as follows:

on the enforcement of intellectual property rights
(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 95 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee (1),

After consulting the Committee of the Regions,

Acting in accordance with the procedure laid down in Article 251 of the Treaty (2),

Whereas:

(1) The achievement of the internal market entails eliminating restrictions on freedom of movement and distortions of competition, while creating an environment conducive to innovation and investment. In this context, the protection of intellectual property is an essential element for the success of the internal market. The protection of intellectual property is important not only for promoting innovation and creativity, but also for developing employment and improving competitiveness.

(2) The protection of intellectual property should allow the inventor or creator to derive a legitimate profit from his/her invention or creation. It should also allow the widest possible dissemination of works, ideas and new know-how. At the same time, it should not hamper freedom of expression, the free movement of information, or the protection of personal data, including on the Internet.

(3) However, without effective means of enforcing intellectual property rights, innovation and creativity are discouraged and investment diminished. It is therefore necessary to ensure that the substantive law on intellectual property, which is nowadays largely part of the acquis communautaire, is applied effectively in the Community. In this respect, the means of enforcing intellectual property rights are of paramount importance for the success of the internal market.

(4) At international level, all Member States, as well as the Community itself as regards matters within its competence, are bound by the Agreement on trade-related aspects of intellectual property (the TRIPS Agreement), approved, as part of the multilateral negotiations of the Uruguay Round, by Council Decision 94/800/EC (3) and concluded in the framework of the World Trade Organisation.

(5) The TRIPS Agreement contains, in particular, provisions on the means of enforcing intellectual property rights, which are common standards applicable at international level and implemented in all Member States. This Directive should not affect Member States’ international obligations, including those under the TRIPS Agreement.

(6) There are also international conventions to which all Member States are parties and which also contain provisions on the means of enforcing intellectual property rights. These include, in particular, the Paris Convention for the Protection of Industrial Property, the Berne Convention for the Protection of Literary and Artistic Works, and the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations.

(7) It emerges from the consultations held by the Commission on this question that, in the Member States, and despite the TRIPS Agreement, there are still major disparities as regards the means of enforcing intellectual property rights. For instance, the arrangements for applying provisional measures, which are used in particular to preserve evidence, the calculation of damages, or the arrangements for applying injunctions, vary widely from one Member State to another. In some Member States, there are no measures, procedures and remedies such as the right of information and the recall, at the infringer's expense, of the infringing goods placed on the market.

(8) The disparities between the systems of the Member States as regards the means of enforcing intellectual property rights are prejudicial to the proper functioning of the Internal Market and make it impossible to ensure that intellectual property rights enjoy an equivalent level of protection throughout the Community. This situation does not promote free movement within the internal market or create an environment conducive to healthy competition.

(9) The current disparities also lead to a weakening of the substantive law on intellectual property and to a fragmentation of the internal market in this field. This causes a loss of confidence in the internal market in business circles, with a consequent reduction in investment in innovation and creation. Infringements of intellectual property rights appear to be increasingly linked to organised crime. Increasing use of the Internet enables pirated products to be distributed instantly around the globe. Effective enforcement of the substantive law on intellectual property should be ensured by specific action at Community level. Approximation of the legislation of the Member States in this field is therefore an essential prerequisite for the proper functioning of the internal market.

(10) The objective of this Directive is to approximate legislative systems so as to ensure a high, equivalent and homogeneous level of protection in the internal market.

(11) This Directive does not aim to establish harmonised rules for judicial cooperation, jurisdiction, the recognition and enforcement of decisions in civil and commercial matters, or deal with applicable law. There are Community instruments which govern such matters in general terms and are, in principle, equally applicable to intellectual property.

(12) This Directive should not affect the application of the rules of competition, and in particular Articles 81 and 82 of the Treaty. The measures provided for in this Directive should not be used to restrict competition unduly in a manner contrary to the Treaty.

(13) It is necessary to define the scope of this Directive as widely as possible in order to encompass all the intellectual property rights covered by Community provisions in this field and/or by the national law of the Member State concerned. Nevertheless, that requirement does not affect the possibility, on the part of those Member States which so wish, to extend, for internal purposes, the provisions of this Directive to include acts involving unfair competition, including parasitic copies, or similar activities.

(14) The measures provided for in Articles 6(2), 8(1) and 9(2) need to be applied only in respect of acts carried out on a commercial scale. This is without prejudice to the possibility for Member States to apply those measures also in respect of other acts. Acts carried out on a commercial scale are those carried out for direct or indirect economic or commercial advantage; this would normally exclude acts carried out by end consumers acting in good faith.


(17) The measures, procedures and remedies provided for in this Directive should be determined in each case in such a manner as to take due account of the specific characteristics of that case, including the specific features of each intellectual property right and, where appropriate, the intentional or unintentional character of the infringement.

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(18) The persons entitled to request application of those measures, procedures and remedies should be not only the rightholders but also persons who have a direct interest and legal standing in so far as permitted by and in accordance with the applicable law, which may include professional organisations in charge of the management of those rights or for the defence of the collective and individual interests for which they are responsible.

(19) Since copyright exists from the creation of a work and does not require formal registration, it is appropriate to adopt the rule laid down in Article 15 of the Berne Convention, which establishes the presumption whereby the author of a literary or artistic work is regarded as such if his/her name appears on the work. A similar presumption should be applied to the owners of related rights since it is often the holder of a related right, such as a phonogram producer, who will seek to defend rights and engage in fighting acts of piracy.

(20) Given that evidence is an element of paramount importance for establishing the infringement of intellectual property rights, it is appropriate to ensure that effective means of presenting, obtaining and preserving evidence are available. The procedures should have regard to the rights of the defence and provide the necessary guarantees, including the protection of confidential information. For infringements committed on a commercial scale it is also important that the courts may order access, where appropriate, to banking, financial or commercial documents under the control of the alleged infringer.

(21) Other measures designed to ensure a high level of protection exist in certain Member States and should be made available in all the Member States. This is the case with the right of information, which allows precise information to be obtained on the origin of the infringing goods or services, the distribution channels and the identity of any third parties involved in the infringement.

(22) It is also essential to provide for provisional measures for the immediate termination of infringements, without awaiting a decision on the substance of the case, while observing the rights of the defence, ensuring the proportionality of the provisional measures as appropriate to the characteristics of the case in question and providing the guarantees needed to cover the costs and the injury caused to the defendant by an unjustified request. Such measures are particularly justified where any delay would cause irreparable harm to the holder of an intellectual property right.

(23) Without prejudice to any other measures, procedures and remedies available, rightholders should have the possibility of applying for an injunction against an intermediary whose services are being used by a third party to infringe the rightholder’s industrial property right. The conditions and procedures relating to such injunctions should be left to the national law of the Member States. As far as infringements of copyright and related rights are concerned, a comprehensive level of harmonisation is already provided for in Directive 2001/29/EC. Article 8(3) of Directive 2001/29/EC should therefore not be affected by this Directive.

(24) Depending on the particular case, and if justified by the circumstances, the measures, procedures and remedies to be provided for should include prohibitory measures aimed at preventing further infringements of intellectual property rights. Moreover there should be corrective measures, where appropriate at the expense of the infringer, such as the recall and definitive removal from the channels of commerce, or destruction, of the infringing goods and, in appropriate cases, of the materials and implements principally used in the creation or manufacture of these goods. These corrective measures should take account of the interests of third parties including, in particular, consumers and private parties acting in good faith.

(25) Where an infringement is committed unintentionally and without negligence and where the corrective measures or injunctions provided for by this Directive would be disproportionate, Member States should have the option of providing for the possibility, in appropriate cases, of pecuniary compensation being awarded to the injured party as an alternative measure. However, where the commercial use of counterfeit goods or the supply of services would constitute an infringement of law other than intellectual property law or would be likely to harm consumers, such use or supply should remain prohibited.

(26) With a view to compensating for the prejudice suffered as a result of an infringement committed by an infringer who engaged in an activity in the knowledge, or with reasonable grounds for knowing, that it would give rise to such an infringement, the amount of damages awarded to the rightholder should take account of all appropriate aspects, such as loss of earnings incurred by the rightholder, or unfair profits made by the infringer and, where appropriate, any moral prejudice caused to the rightholder. As an alternative, for example where it would be difficult to determine the amount of the actual prejudice suffered, the amount of the damages might be derived from elements such as the royalties or fees which would have been due if the infringer had requested authorisation to use the intellectual property right in question. The aim is not to
introduce an obligation to provide for punitive damages but to allow for compensation based on an objective criterion while taking account of the expenses incurred by the rightholder, such as the costs of identification and research.

(27) To act as a supplementary deterrent to future infringers and to contribute to the awareness of the public at large, it is useful to publicise decisions in intellectual property infringement cases.

(28) In addition to the civil and administrative measures, procedures and remedies provided for under this Directive, criminal sanctions also constitute, in appropriate cases, a means of ensuring the enforcement of intellectual property rights.

(29) Industry should take an active part in the fight against piracy and counterfeiting. The development of codes of conduct in the circles directly affected is a supplementary means of bolstering the regulatory framework. The Member States, in collaboration with the Commission, should encourage the development of codes of conduct in general. Monitoring of the manufacture of optical discs, particularly by means of an identification code embedded in discs produced in the Community, helps to limit infringements of intellectual property rights in this sector, which suffers from piracy on a large scale. However, these technical protection measures should not be misused to protect markets and prevent parallel imports.

(30) In order to facilitate the uniform application of this Directive, it is appropriate to provide for systems of cooperation and the exchange of information between Member States, on the one hand, and between the Member States and the Commission on the other, in particular by creating a network of correspondents designated by the Member States and by providing regular reports assessing the application of this Directive and the effectiveness of the measures taken by the various national bodies.

(31) Since, for the reasons already described, the objective of this Directive can best be achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.

(32) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular, this Directive seeks to ensure full respect for intellectual property, in accordance with Article 17(2) of that Charter,

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I

OBJECTIVE AND SCOPE

Article 1

Subject matter

This Directive concerns the measures, procedures and remedies necessary to ensure the enforcement of intellectual property rights. For the purposes of this Directive, the term ‘intellectual property rights’ includes industrial property rights.

Article 2

Scope

1. Without prejudice to the means which are or may be provided for in Community or national legislation, in so far as those means may be more favourable for rightholders, the measures, procedures and remedies provided for by this Directive shall apply, in accordance with Article 3, to any infringement of intellectual property rights as provided for by Community law and/or by the national law of the Member State concerned.

2. This Directive shall be without prejudice to the specific provisions on the enforcement of rights and on exceptions contained in Community legislation concerning copyright and rights related to copyright, notably those found in Directive 91/250/EEC and, in particular, Article 7 thereof or in Directive 2001/29/EC and, in particular, Articles 2 to 6 and Article 8 thereof.

3. This Directive shall not affect:

(a) the Community provisions governing the substantive law on intellectual property, Directive 95/46/EC, Directive 1999/93/EC or Directive 2000/31/EC, in general, and Articles 12 to 15 of Directive 2000/31/EC in particular;

(b) Member States’ international obligations and notably the TRIPS Agreement, including those relating to criminal procedures and penalties;

(c) any national provisions in Member States relating to criminal procedures or penalties in respect of infringement of intellectual property rights.
CHAPTER II

MEASURES, PROCEDURES AND REMEDIES

Section 1

General provisions

Article 3

General obligation

1. Member States shall provide for the measures, procedures and remedies necessary to ensure the enforcement of the intellectual property rights covered by this Directive. Those measures, procedures and remedies shall be fair and equitable and shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.

2. Those measures, procedures and remedies shall also be effective, proportionate and dissuasive and shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.

Article 4

Persons entitled to apply for the application of the measures, procedures and remedies

Member States shall recognise as persons entitled to seek application of the measures, procedures and remedies referred to in this chapter:

(a) the holders of intellectual property rights, in accordance with the provisions of the applicable law;

(b) all other persons authorised to use those rights, in particular licensees, in so far as permitted by and in accordance with the provisions of the applicable law;

(c) intellectual property collective rights-management bodies which are regularly recognised as having a right to represent holders of intellectual property rights, in so far as permitted by and in accordance with the provisions of the applicable law;

(d) professional defence bodies which are regularly recognised as having a right to represent holders of intellectual property rights, in so far as permitted by and in accordance with the provisions of the applicable law.

Article 5

Presumption of authorship or ownership

For the purposes of applying the measures, procedures and remedies provided for in this Directive,

(a) for the author of a literary or artistic work, in the absence of proof to the contrary, to be regarded as such, and consequently to be entitled to institute infringement proceedings, it shall be sufficient for his/her name to appear on the work in the usual manner;

(b) the provision under (a) shall apply mutatis mutandis to the holders of rights related to copyright with regard to their protected subject matter.

Section 2

Evidence

Article 6

Evidence

1. Member States shall ensure that, on application by a party which has presented reasonably available evidence sufficient to support its claims, and has, in substantiating those claims, specified evidence which lies in the control of the opposing party, the competent judicial authorities may order that such evidence be presented by the opposing party, subject to the protection of confidential information. For the purposes of this paragraph, Member States may provide that a reasonable sample of a substantial number of copies of a work or any other protected object be considered by the competent judicial authorities to constitute reasonable evidence.

2. Under the same conditions, in the case of an infringement committed on a commercial scale Member States shall take such measures as are necessary to enable the competent judicial authorities to order, where appropriate, on application by a party, the communication of banking, financial or commercial documents under the control of the opposing party, subject to the protection of confidential information.

Article 7

Measures for preserving evidence

1. Member States shall ensure that, even before the commencement of proceedings on the merits of the case, the competent judicial authorities may, on application by a party who has
presented reasonably available evidence to support his/her claims that his/her intellectual property right has been infringed or is about to be infringed, order prompt and effective provisional measures to preserve relevant evidence in respect of the alleged infringement, subject to the protection of confidential information. Such measures may include the detailed description, with or without the taking of samples, or the physical seizure of the infringing goods, and, in appropriate cases, the materials and implements used in the production and/or distribution of these goods and the documents relating thereto. Those measures shall be taken, if necessary without the other party having been heard, in particular where any delay is likely to cause irreparable harm to the rightholder or where there is a demonstrable risk of evidence being destroyed.

Where measures to preserve evidence are adopted without the other party having been heard, the parties affected shall be given notice, without delay after the execution of the measures at the latest. A review, including a right to be heard, shall take place upon request of the parties affected with a view to deciding, within a reasonable period after the notification of the measures, whether the measures shall be modified, revoked or confirmed.

2. Member States shall ensure that the measures to preserve evidence may be subject to the lodging by the applicant of adequate security or an equivalent assurance intended to ensure compensation for any prejudice suffered by the defendant as provided for in paragraph 4.

3. Member States shall ensure that the measures to preserve evidence are revoked or otherwise cease to have effect, upon request of the defendant, without prejudice to the damages which may be claimed, if the applicant does not institute, within a reasonable period, proceedings leading to a decision on the merits of the case before the competent judicial authority, the period to be determined by the judicial authority ordering the measures where the law of a Member State so permits or, in the absence of such determination, within a period not exceeding 20 working days or 31 calendar days, whichever is the longer.

4. Where the measures to preserve evidence are revoked, or where they lapse due to any act or omission by the applicant, or where it is subsequently found that there has been no infringement or threat of infringement of an intellectual property right, the judicial authorities shall have the authority to order the applicant, upon request of the defendant, to provide the defendant appropriate compensation for any injury caused by those measures.

5. Member States may take measures to protect witnesses’ identity.

Section 3

Right of information

Article 8

Right of information

1. Member States shall ensure that, in the context of proceedings concerning an infringement of an intellectual property right and in response to a justified and proportionate request of the claimant, the competent judicial authorities may order that information on the origin and distribution networks of the goods or services which infringe an intellectual property right be provided by the infringer and/or any other person who:

(a) was found in possession of the infringing goods on a commercial scale;

(b) was found to be using the infringing services on a commercial scale;

(c) was found to be providing on a commercial scale services used in infringing activities;

or

(d) was indicated by the person referred to in point (a), (b) or (c) as being involved in the production, manufacture or distribution of the goods or the provision of the services.

2. The information referred to in paragraph 1 shall, as appropriate, comprise:

(a) the names and addresses of the producers, manufacturers, distributors, suppliers and other previous holders of the goods or services, as well as the intended wholesalers and retailers;

(b) information on the quantities produced, manufactured, delivered, received or ordered, as well as the price obtained for the goods or services in question.

3. Paragraphs 1 and 2 shall apply without prejudice to other statutory provisions which:

(a) grant the rightholder rights to receive fuller information;

(b) govern the use in civil or criminal proceedings of the information communicated pursuant to this Article;
(c) govern responsibility for misuse of the right of information;

or

(d) afford an opportunity for refusing to provide information which would force the person referred to in paragraph 1 to admit to his/her own participation or that of his/her close relatives in an infringement of an intellectual property right;

or

(e) govern the protection of confidentiality of information sources or the processing of personal data.

Section 4

Provisional and precautionary measures

Article 9

Provisional and precautionary measures

1. Member States shall ensure that the judicial authorities may, at the request of the applicant:

(a) issue against the alleged infringer an interlocutory injunction intended to prevent any imminent infringement of an intellectual property right, or to forbid, on a provisional basis and subject, where appropriate, to a recurring penalty payment where provided for by national law, the continuation of the alleged infringements of that right, or to make such continuation subject to the lodging of guarantees intended to ensure the compensation of the rightholder; an interlocutory injunction may also be issued, under the same conditions, against an intermediary whose services are used by a third party to infringe an intellectual property right; injunctions against intermediaries whose services are used by a third party to infringe a copyright or a related right are covered by Directive 2001/29/EC;

(b) order the seizure or delivery up of the goods suspected of infringing an intellectual property right so as to prevent their entry into or movement within the channels of commerce.

2. In the case of an infringement committed on a commercial scale, the Member States shall ensure that, if the injured party demonstrates circumstances likely to endanger the recovery of damages, the judicial authorities may order the precautionary seizure of the movable and immovable property of the alleged infringer, including the blocking of his/her bank accounts and other assets. To that end, the competent authorities may order the communication of bank, financial or commercial documents, or appropriate access to the relevant information.

3. The judicial authorities shall, in respect of the measures referred to in paragraphs 1 and 2, have the authority to require the applicant to provide any reasonably available evidence in order to satisfy themselves with a sufficient degree of certainty that the applicant is the rightholder and that the applicant’s right is being infringed, or that such infringement is imminent.

4. Member States shall ensure that the provisional measures referred to in paragraphs 1 and 2 may, in appropriate cases, be taken without the defendant having been heard, in particular where any delay would cause irreparable harm to the rightholder. In that event, the parties shall be so informed without delay after the execution of the measures at the latest.

A review, including a right to be heard, shall take place upon request of the defendant with a view to deciding, within a reasonable time after notification of the measures, whether those measures shall be modified, revoked or confirmed.

5. Member States shall ensure that the provisional measures referred to in paragraphs 1 and 2 are revoked or otherwise cease to have effect, upon request of the defendant, if the applicant does not institute, within a reasonable period, proceedings leading to a decision on the merits of the case before the competent judicial authority, the period to be determined by the judicial authority ordering the measures where the law of a Member State so permits or, in the absence of such determination, within a period not exceeding 20 working days or 31 calendar days, whichever is the longer.

6. The competent judicial authorities may make the provisional measures referred to in paragraphs 1 and 2 subject to the lodging by the applicant of adequate security or an equivalent assurance intended to ensure compensation for any prejudice suffered by the defendant as provided for in paragraph 7.

7. Where the provisional measures are revoked or where they lapse due to any act or omission by the applicant, or where it is subsequently found that there has been no infringement or threat of infringement of an intellectual property right, the judicial authorities shall have the authority to order the applicant, upon request of the defendant, to provide the defendant appropriate compensation for any injury caused by those measures.

Section 5

Measures resulting from a decision on the merits of the case

Article 10

Corrective measures

1. Without prejudice to any damages due to the rightholder by reason of the infringement, and without compensation of any sort, Member States shall ensure that the competent judicial
authorities may order, at the request of the applicant, that appropriate measures be taken with regard to goods that they have found to be infringing an intellectual property right and, in appropriate cases, with regard to materials and implements principally used in the creation or manufacture of those goods. Such measures shall include:

(a) recall from the channels of commerce;

(b) definitive removal from the channels of commerce;

or

(c) destruction.

2. The judicial authorities shall order that those measures be carried out at the expense of the infringer, unless particular reasons are invoked for not doing so.

3. In considering a request for corrective measures, the need for proportionality between the seriousness of the infringement and the remedies ordered as well as the interests of third parties shall be taken into account.

**Article 11**

**Injunctions**

Member States shall ensure that, where a judicial decision is taken finding an infringement of an intellectual property right, the judicial authorities may issue against the infringer an injunction aimed at prohibiting the continuation of the infringement. Where provided for by national law, non-compliance with an injunction shall, where appropriate, be subject to a recurring penalty payment, with a view to ensuring compliance. Member States shall also ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe an intellectual property right, without prejudice to Article 8(3) of Directive 2001/29/EC.

**Article 12**

**Alternative measures**

Member States may provide that, in appropriate cases and at the request of the person liable to be subject to the measures provided for in this section, the competent judicial authorities may order pecuniary compensation to be paid to the injured party instead of applying the measures provided for in this section if that person acted unintentionally and without negligence, if execution of the measures in question would cause him/her disproportionate harm and if pecuniary compensation to the injured party appears reasonably satisfactory.

**Section 6**

**Damages and legal costs**

**Article 13**

**Damages**

1. Member States shall ensure that the competent judicial authorities, on application of the injured party, order the infringer who knowingly, or with reasonable grounds to know, engaged in an infringing activity, to pay the rightholder damages appropriate to the actual prejudice suffered by him/her as a result of the infringement.

When the judicial authorities set the damages:

(a) they shall take into account all appropriate aspects, such as the negative economic consequences, including lost profits, which the injured party has suffered, any unfair profits made by the infringer and, in appropriate cases, elements other than economic factors, such as the moral prejudice caused to the rightholder by the infringement;

or

(b) as an alternative to (a), they may, in appropriate cases, set the damages as a lump sum on the basis of elements such as at least the amount of royalties or fees which would have been due if the infringer had requested authorisation to use the intellectual property right in question.

2. Where the infringer did not knowingly, or with reasonable grounds know, engage in infringing activity, Member States may lay down that the judicial authorities may order the recovery of profits or the payment of damages, which may be pre-established.

**Article 14**

**Legal costs**

Member States shall ensure that reasonable and proportionate legal costs and other expenses incurred by the successful party shall, as a general rule, be borne by the unsuccessful party, unless equity does not allow this.
Section 7

Publicity measures

Article 15

Publication of judicial decisions

Member States shall ensure that, in legal proceedings instituted for infringement of an intellectual property right, the judicial authorities may order, at the request of the applicant and at the expense of the infringer, appropriate measures for the dissemination of the information concerning the decision, including displaying the decision and publishing it in full or in part. Member States may provide for other additional publicity measures which are appropriate to the particular circumstances, including prominent advertising.

CHAPTER III

SANCTIONS BY MEMBER STATES

Article 16

Sanctions by Member States

Without prejudice to the civil and administrative measures, procedures and remedies laid down by this Directive, Member States may apply other appropriate sanctions in cases where intellectual property rights have been infringed.

CHAPTER IV

CODES OF CONDUCT AND ADMINISTRATIVE COOPERATION

Article 17

Codes of conduct

Member States shall encourage:

(a) the development by trade or professional associations or organisations of codes of conduct at Community level aimed at contributing towards the enforcement of the intellectual property rights, particularly by recommending the use on optical discs of a code enabling the identification of the origin of their manufacture;

(b) the submission to the Commission of draft codes of conduct at national and Community level and of any evaluations of the application of these codes of conduct.

Article 18

Assessment

1. Three years after the date laid down in Article 20(1), each Member State shall submit to the Commission a report on the implementation of this Directive.

On the basis of those reports, the Commission shall draw up a report on the application of this Directive, including an assessment of the effectiveness of the measures taken, as well as an evaluation of its impact on innovation and the development of the information society. That report shall then be transmitted to the European Parliament, the Council and the European Economic and Social Committee. It shall be accompanied, if necessary and in the light of developments in the Community legal order, by proposals for amendments to this Directive.

2. Member States shall provide the Commission with all the aid and assistance it may need when drawing up the report referred to in the second subparagraph of paragraph 1.

Article 19

Exchange of information and correspondents

For the purpose of promoting cooperation, including the exchange of information, among Member States and between Member States and the Commission, each Member State shall designate one or more national correspondents for any question relating to the implementation of the measures provided for by this Directive. It shall communicate the details of the national correspondent(s) to the other Member States and to the Commission.

CHAPTER V

FINAL PROVISIONS

Article 20

Implementation

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 29 April 2006. They shall forthwith inform the Commission thereof.
When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the texts of the provisions of national law which they adopt in the field governed by this Directive.

**Article 21**

**Entry into force**

This Directive shall enter into force on the 20th day following that of its publication in the *Official Journal of the European Union*.

**Article 22**

**Addressees**

This Directive is addressed to the Member States.

Done at Strasbourg, 29 April 2004.

*For the European Parliament*

The President

P. COX

*For the Council*

The President

M. McDOWELL


In the following Act, the place of signature is to be corrected as follows:
for: ‘Done at Strasbourg, 29 April 2004.’;
read: ‘Done at Brussels, 29 April 2004.’

———

Corrigendum to Regulation (EC) No 847/2004 of the European Parliament and of the Council of 29 April 2004 on the negotiation and implementation of air service agreements between Member States and third countries


In the following Act, the place of signature is to be corrected as follows:
for: ‘Done at Strasbourg, 29 April 2004.’;
read: ‘Done at Brussels, 29 April 2004.’

———

Corrigendum to Decision No 848/2004/EC of the European Parliament and of the Council of 29 April 2004 establishing a Community action programme to promote organisations active at European level in the field of equality between men and women


In the following Act, the place of signature is to be corrected as follows:
for: ‘Done at Strasbourg, 29 April 2004.’;
read: ‘Done at Brussels, 29 April 2004.’

———


In the following act, the place of signature is to be corrected as follows:
for: ‘Done at Strasbourg, 29 April 2004.’;
read: ‘Done at Brussels, 29 April 2004.’
COVER NOTE

from: Secretary-General of the European Commission,
signed by Mr Jordi AYET PUIGARNAU, Director

date of receipt: 22 December 2010

to: Mr Pierre de BOISSIEU, Secretary-General of the Council of the European Union


Encl.: COM(2010) 779 final

of the European Parliament and the Council of 29 April 2004
on the enforcement of intellectual property rights

SEC(2010) 1589 final
Effective means of enforcing intellectual property rights are essential for promoting innovation and creativity. Directive 2004/48/EC on the enforcement of intellectual property rights harmonises the minimum means available to right holders and public authorities for fighting infringements of intellectual property rights. It also establishes a general framework for exchanging information and administrative co-operation between national authorities and with the Commission.

A first evaluation of the impact of the Directive shows that noteworthy progress has been made since it was adopted and implemented in the Member States. The Directive created high European legal standards to enforce different types of rights that are protected by independent legal regimes (such as copyright, patents, trademarks and designs, but also geographical indications and plant breeders' rights).

However, despite an overall improvement of enforcement procedures, the sheer volume and financial value of intellectual property rights infringements are alarming. One reason is the unprecedented increase in opportunities to infringe intellectual property rights offered by the Internet. The Directive was not designed with this challenge in mind.

Other issues that could need special attention are the use of provisional and precautionary measures such as injunctions, procedures to gather and preserve evidence (including the relationship between the right of information and protection of privacy), clarification of the meaning of various corrective measures, including the costs of destruction, and calculation of damages.
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1. INTRODUCTION

It is essential to find effective means of enforcing intellectual property rights to promote innovation and creativity. This Report provides the first assessment of the implementation and impact of Directive 2004/48/EC on the enforcement of intellectual property rights1 ('the Directive'). This assessment is required by Article 18 of the Directive and is based both on the Commission's appraisal of developments and on feedback received from Member States via national reports, which, in turn, reflect views expressed by industry, legal practitioners, consumers' associations and other interested parties.

The information received points to the conclusion that the Directive has had a substantial and positive effect on protecting intellectual property rights under civil law in Europe. The Directive created a straightforward framework for enforcing intellectual property rights which, broadly, provides comparable protection across national borders. In particular the presumption of authorship or ownership (Article 5), the possibility of "sampling" in the context of information gathering (Article 6), provisional measures to preserve evidence (Article 7) and the possibility of injunctions against intermediaries (Articles 9 and 11) have helped render the enforcement of intellectual property rights in the EU more effective.

However, due to late transposition of the Directive in many Member States (the transposition process was not completed until 2009)\(^2\) experience in applying the Directive is limited and only few court cases have been reported. Therefore, the Commission has not been able to conduct a critical economic analysis of the impact that the Directive has had on innovation and on development of the information society, as provided for in Article 18 of the Directive.

Despite these limitations, this initial evaluation of the effectiveness of the Directive comes at the right time. Several studies carried out by international organisations and industry have shown that infringements of intellectual property rights have reached a significant level, with certain of these goods posing a danger to consumers' health and safety\(^3\). In response, over the last two years, the Commission has adopted two Communications\(^4\). The second one, inter alia, set up a European Observatory on Counterfeiting and Piracy to improve the understanding on IPR infringements and create a platform for representatives from national authorities and stakeholders to exchange ideas and expertise on best practices, develop joint enforcement strategies and make recommendations to policy-makers. These were followed by two Council Resolutions\(^5\) that supported the Commission’s policy. The report adopted by the European Parliament also expressed support for an enhanced policy, including a strong legal framework to combat counterfeiting and piracy\(^6\). Infringements of intellectual property rights taking place outside of the EU also constitute a major source of concern. The Commission is addressing them in different ways, for instance by including ambitious chapters on intellectual property rights in bilateral trade agreements and through participation in international initiatives, such as the on-going negotiation of the ACTA agreement\(^7\).

The analysis shows that certain provisions of the Directive including the relationship with other Directives are understood in different ways in the different Member States and have given rise to different interpretations and application in practice. These provisions could warrant further clarifications to make the Directive fully effective.

The Internet and digital technologies have added an extra, challenging dimension to enforcing intellectual property rights. On the one hand, the Internet has allowed creators, inventors and their commercial partners to find new ways to market their products. On the other hand, it has also opened the door to new forms of infringements, some of which have proved difficult to combat.

This Report sets out a series of concrete issues where clarification may be needed, in particular to adapt the Directive to the new challenges inherent in a modern Digital Society. It

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\(^2\) The deadline for the implementation of the Directive, for the then 25 Member States, expired on 29 April 2006. For details on the transposition process see Annex 1 to the Staff Working Paper that accompanies this Report.


is complemented by a Commission Staff Working Document which provides additional information and background on its findings.

2. **THE OBJECTIVES OF THE ENFORCEMENT DIRECTIVE**

Disparities between the Member States' systems for enforcing intellectual property rights undermine the proper functioning of the internal market and weaken the enforcement of the substantive law on such rights. This leads to barriers to cross-border activities, loss of confidence in the internal market and lower investment in innovation and creation. The Directive draws national legislative systems closer together to give rightholders and Member States' authorities a minimum but standard toolbox to combat infringements of intellectual property rights.

The Directive incorporates civil law measures under the TRIPS Agreement\(^8\) into the EU legal framework. It goes beyond the minimum provisions laid down in that Agreement as it also covers, for example, damages, corrective measures and evidence. In addition, the Directive is based on the practices enshrined in the legislation of the Member States that proved to be most effective before the Directive was adopted (the 'best practices approach'). Member States may also add sanctions and remedies that are more favourable to rightholders\(^9\). The Directive therefore provides a minimum but flexible legal framework for enforcing intellectual property rights.

3. **CLARIFICATIONS MAY BE REQUIRED FOR MORE EFFECTIVE PROTECTION OF INTELLECTUAL PROPERTY RIGHTS AND A BETTER FUNCTIONING INTERNAL MARKET**

The analysis of the implementation of the Directive in the Member States shows that the Directive lays a solid foundation for enforcing intellectual property rights in the internal market, but that certain clarification may be needed to avoid any ambiguities and adapt the Directive to the new challenges posed in particular by today's digital environment.

3.1. **Specific challenges of the digital environment**

The multi-purpose nature of the Internet makes it easy to commit a wide variety of infringements of intellectual property rights. Goods infringing intellectual property rights are offered for sale on the Internet. Search engines often enable fraudsters to attract Internet users to their unlawful offers available for sale or download. File-sharing of copyright-protected content has become ubiquitous, partly because the development of legal offers of digital content has not been able to keep up with demand, especially on a cross-border basis, and has led many law-abiding citizens to commit massive infringements of copyright and related rights in the form of illegal up-loading and disseminating protected content. Many online sites are either hosting or facilitating the online distribution of protected works without the consent of the right holders. In this context, the limitations of the existing legal framework may need to be clearly assessed.


\(^9\) See Article 2(1) of the Directive.
3.2. The scope of the Directive

The Directive applies to all infringements of intellectual property rights protected under European or national law and contains no definitions of the intellectual property rights it covers. Although this flexible approach offers several advantages, different interpretations of the concept of 'intellectual property right', led Member States to ask the Commission to publish a minimum list of the intellectual property rights which it considers are covered by the Directive10.

Even after the Commission published this clarification, uncertainties still remain as to whether some rights protected under national law are covered. This mainly concerns domain names, national rights on matters such as trade secrets (including know-how) and other acts frequently covered by national unfair competition law such as parasitic copies and other forms of 'competing on the edge of the law'. These forms of commercial misbehaviour seem to be on the rise, too. They often have damaging effects on the rightholders, undermine innovation and bring only short-term benefits to consumers. It could be useful to further assess this negative phenomenon and the need to include, in the Directive, a minimum list of the intellectual property rights covered.

3.3. The concept of intermediaries and the workability of injunctions

The Directive makes a broad interpretation of the concept of 'intermediaries' to include all intermediaries 'whose services are used by a third party to infringe an intellectual property right'. This implies that even intermediaries with no direct contractual relationship or connection with the infringer are subject to these measures provided for in the Directive.

Nevertheless, the level of evidence required by the courts in the Member States is generally rather high. Furthermore, uncertainties remain over intermediaries and the specific measures to which they are subject by contributing to or facilitating an infringement, regardless of their liability.

Intermediaries who transport goods suspected of infringing intellectual property rights (such as carriers, freight forwarders, or shipping agents) can play a leading role in controlling the distribution of goods that infringe intellectual property rights. Internet platforms such as online market places or search engines can also play an important role in reducing the number of the infringements, in particular through preventive measures and 'notice and take-down' policies.

Internet service providers are also key to the way the online environment works. They provide access to the Internet and interconnect the underlying networks, host websites and servers. As intermediaries between all users of the Internet and the rightholders, they are often placed in a compromising position by unlawful acts committed by their customers. For this reason, EU law already contains specific provisions limiting the liability of Internet service providers whose services are used to infringe intellectual property rights11.

Measures to be taken against intermediaries concern, in particular, the right of information, provisional and precautionary measures (e.g. interlocutory injunctions), or permanent injunctions.

The Directive leaves it to Member States to determine when and how an injunction can be issued against an intermediary. For this to work efficiently, it could be useful to clarify that injunctions should not depend on the liability of the intermediary. Furthermore, the findings reported in the Staff Working Paper that accompanies this Report indicate that the currently available legislative and non-legislative instruments are not powerful enough to combat online infringements of intellectual property rights effectively. Given intermediaries' favourable position to contribute to the prevention and termination of online infringements, the Commission could explore how to involve them more closely.

3.4. The question of the right balance between the right of information and privacy laws

The right of information obliges the infringer or another person to provide to the rightholder information on the origin and distribution networks of the goods which infringe intellectual property rights. The main challenge regarding this right is the need to respect privacy laws and the protection of personal data.

In some Member States the right of information provided for in the Directive seems to be granted very restrictively, mainly due to national laws on the protection and retention of personal data. This issue could deserve special attention. National laws must also allow the courts to apply EU law on enforcement of intellectual property rights. According to the Court of Justice of the European Union a fair balance must be struck between the various rights at stake (such as the right to data protection and the right to property, which includes intellectual property rights) given that both data protection/privacy and the protection of intellectual property are recognised as fundamental rights by the Charter of Fundamental Rights of the European Union.

The European legal framework on the protection of personal data on the one hand and enforcement of intellectual property rights on the other is neutral, in that there is no rule implying that the right to privacy should generally take precedence over the right to property or vice versa. National laws implementing the various directives must therefore be construed in a way that allows a balance to be struck between these rights in each case in order to guarantee that the provision on the right of information can protect the rightholders effectively without compromising rights relating to the protection of personal data. Further evaluations

12 Examples are, according to the 2009 Study on Online Copyright Enforcement and Data Protection in Selected Member States (Hunton & Williams, Brussels, http://ec.europa.eu/internal_market/IPreEnforcement/docs/study-online-enforcement_en.pdf), Austria and Spain.
13 Judgment of 29 January 2008 in the case C-275/06 Productores de Música de España (Promusicae) v Telefónica de España SAU; judgment of 19 February 2009 in the case C-557/07 LSG-Gesellschaft zur Wahrnehmung von Leistungsschutzrechten GMBH v Tele2 Telecommunication GMBH.
could be needed on the extent to which Member States' laws and the way they are applied are consistent with these requirements. If necessary, means to remedy the situation and strike an appropriate balance between the rights at stake could also be considered.

3.5. The compensatory and dissuasive effect of damages

Measures, procedures and remedies provided for by the Directive must be effective, proportionate and dissuasive. At present, damages awarded in intellectual property rights cases remain comparatively low. Only a few Member States have reported an increase in the damages awarded, as a result of implementing the Directive.

According to information received from rightholders, damages awards do not currently appear to effectively dissuade potential infringers from engaging in illegal activities. This is particularly so where damages awarded by the courts fail to match the level of profit made by the infringers.

The main aim of awarding damages is to place the rightholders in the same situation as they would have been in, in the absence of the infringement. Nowadays, however, infringers' profits (unjust enrichment) often appear to be substantially higher than the actual damage incurred by the rightholder. In such cases, it could be considered whether the courts should have the power to grant damages commensurate with the infringer's unjust enrichment, even if they exceed the actual damage incurred by the rightholder. Equally, there could be a case for making greater use of the possibility to award damages for other economic consequences and moral damages.

In cases where the infringer is a legal person and the rightholder fails to obtain damages because the infringer has no assets, has been liquidated or is in any other way insolvent, an assessment could be made as to whether the rightholder is able to claim damages from the company's managing director(s) under national law, and if so under what conditions.

3.6. Corrective measures

As set out in more detail in the Commission Staff Working Document, further clarification of the definition of 'corrective measures' might be needed. In particular, the distinction between 'recall' and the 'definitive removal' of goods found to infringe intellectual property right from channels of commerce is not clear-cut under most national legislation. Another point which could be clarified is how to apply these measures if the goods are no longer in the possession of the infringer.

Lastly, as to the costs of the destruction of the infringing goods, consideration could be given to how to ensure that these costs can be imposed by the court directly on the unsuccessful party.

3.7. Other issues

A number of other issues emerge from the analysis of the implementation of the Directive by the Member States which could deserve further discussion at EU level.

Firstly, it seems that Member States have rarely taken up the optional provisions of the Directive (e.g. concerning description orders that provide for a court clerk to enter the premises of the alleged infringer and examine the situation. This optional provision of the Directive has not been implemented by some Member States for civil proceedings and
therefore this kind of measure is available only in the context of criminal proceedings). The cases where Member States, in accordance with Article 2(1), have adopted rules that are more favourable to right holders than those of the Directive are even more rare. The reasons for this could be examined in more detail. The link between the 'commercial scale' requirement (i.e. the requirement that the infringing act is carried out for direct or indirect economic or commercial advantage) and the right of information in Member States' rules could also be explored further.

Secondly, the options available to address problems in collecting evidence in cross-border cases could be assessed, as well as the need to define more precisely when information can be considered to be "under the control" of a party to a judicial proceeding (Article 6(1)). Whether the current rules on collecting evidence in cases involving confidential information create problems in practice, in particular in the context of provisional measures and in cases where different national concepts of confidentiality come into play, might also warrant further evaluation.

Lastly, the usefulness of harmonising the secondary use of goods infringing intellectual property rights and possible problems related to such harmonisation could be explored.

4. CONCLUSION

Infringements of intellectual property rights cause widespread economic harm. A significant number of products infringing intellectual property rights now pose a real threat to consumer health and safety. Proper protection of intellectual property rights is fundamental to stimulate innovation and culture in a competitive, wealth-generating, knowledge-based economy. Different interests have to be carefully balanced. To this end, the Commission will continue to be actively engaged with all stakeholders.

The main conclusion drawn from this first evaluation of the Directive is that the Directive has had a substantial and positive effect on the protection of intellectual property rights by civil law in Europe. However, it has become apparent that the Directive was not designed with the challenge posed by the Internet to the enforcement of intellectual property rights in mind. In addition, several issues could deserve further attention. Among them, one could mention the use of provisional and precautionary measures such as injunctions, procedures to gather and preserve evidence (including the relationship between the right of information and protection of privacy), clarification of the meaning of various corrective measures, including the costs of destruction, and calculation of damages.

With a view to informing the Commission's decisions on any future measure that might be envisaged and to feed the thorough impact assessment work that the Commission is launching as concerns the issues mentioned in this Report, the Commission welcomes any feedback from the European Parliament, the Council of Ministers, Member States, the European Economic and Social Committee and all other interested parties on this Report by 31 March 2011.
COUNCIL OF
THE EUROPEAN UNION

Brussels, 10 January 2011

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COVER NOTE

from: Secretary-General of the European Commission,
signed by Mr Jordi AYET PUIGARNAU, Director

date of receipt: 22 December 2010

to: Mr Pierre de BOISSIEU, Secretary-General of the Council of the European

Union

Subject: COMMISSION STAFF WORKING DOCUMENT
Analysis of the application of Directive 2004/48/EC of the European
Parliament and the Council of 29 April 2004 on the enforcement of intellectual
property rights in the Member States
- Accompanying document to the Report from the Commission to the Council,
the European Parliament and the European Social Committee on the
Council of 29 April 2004 on the enforcement of intellectual property rights


Encl.: SEC(2010) 1589 final
COMMISSION STAFF WORKING DOCUMENT


Accompanying document to the


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1. **INTRODUCTION AND GENERAL REMARKS**

Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights\(^1\) (hereinafter referred to as the "Directive") was to be transposed by 29 April 2006. Article 18 of the Directive requires Member States to submit to the Commission a report on the implementation of the Directive three years after that date.


The Report is based on the reports received from the Member States according to Article 18 of the Directive but also on the Commission's own assessment of the situation and on feedback received from stakeholders and legal practitioners.

Due to the late transposition of the Directive in many Member States and the fact that some Member State did not provide the application report provided for in the Directive\(^2\) or provided only some information of a very general nature, the information available on the impact of the Directive is too limited to allow for a full assessment of its effectiveness at this stage (see Annex 3 for further detail on the methodology of this report). However, in the context of the European Observatory on Counterfeiting and Piracy, DG Internal Market and Services works with experts from the private sector to assess the application of the Directive and to complete the information received from the Member States. Although this work is still continuing, the information received so far allows already identifying a certain number of issues related to the Directive that deserve attention.

This paper (1) chronologically describes the transposition of the different articles of the Directive by the Member States and their application in practice, problems which have arisen in the interpretation of some provisions but also sets out other issues that currently are not explicitly covered by the Directive but have proved to be of importance for an effective enforcement of intellectual property rights, and (2) draws a number of conclusions as to the issues that could be addressed in the context of a possible review of the Directive.

2. **THE TRANSPOSITION OF THE DIRECTIVE BY THE MEMBER STATES AND ITS APPLICATION IN PRACTICE**

The Directive's provisions (only) relate to civil law measures to enforce intellectual property rights. They encompass, in particular, evidence-gathering powers for judicial authorities, powers to force offenders and any other party commercially involved in an infringement to provide information on the origin of the infringing goods and of the distribution networks, provisional and precautionary measures such as interlocutory injunctions or seizures of suspect goods, corrective measures including permanent injunctions, recall and definitive

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\(^1\) OJ L 157, 30.04.2004, p. 16.

\(^2\) For details on the transposition process and the reports received from the Member States see Annex 1.
removal of the infringing goods from channels of commerce, powers to force offenders to pay damages and measures related to the publication of judicial decisions.

2.1. Subject Matter and Scope of Application (Articles 1 and 2)

The Directive covers all infringements of intellectual property rights without containing any definition of intellectual property rights. The scope is not limited to those rights harmonized at EU level, but also covers rights protected as intellectual property rights by national law.

This technique used by the Directive has the advantage of providing a high degree of flexibility as the Directive's scope adapts to changing definitions of intellectual property rights, both at EU and at national level. However, several questions remain open. Thus, some uncertainties have arisen as to whether domain names, trade (business) secrets, including know-how, are covered by the Directive, and whether the Directive is applicable to other acts of unfair competition (for example parasitic copying). The status and the form of protection of trade (business) secrets, including know-how, and the treatment of acts of unfair competition and of domain names is very different among Member States. It seems to derive from the wording of the Directive that in cases where they are protected as an intellectual property right at national level, they should be understood as being covered by the scope of the Directive. However, in view of the diverging interpretations in the Member States it could be important to provide some clarification in that respect.

Article 2(1) of the Directive states that Member States may provide for sanctions and remedies that are more favourable to rightholders. The Directive therefore provides only for minimum harmonisation as far as enforcement measures are concerned. Some Member States have gone beyond the Directive's provisions and have introduced stricter measures. From the Commission's observations as well as from the stakeholders' consultation it however appears, that this was only the case for a few provisions in the Directive. One of the examples where some Member States have gone beyond the Directive's wording was the right of information (Article 8) which, according to the Directive, is limited to the activities carried out on a commercial scale if the request is not directed towards the infringer. A significant number of Member States (e.g. Denmark, Estonia, Greece, France, Lithuania, Slovak Republic) have gone beyond the 'commercial scale' requirement (of which there is no definition in the Directive) and introduced this measure for all infringements (for more details see section 2.3.2). Another example where Member States have gone beyond the Directive's provisions was damages. As far as damages are concerned, most Member States did not specifically implement the Directive's provisions as they felt that their national laws already covered them sufficiently. However, as far as lump sum damages are concerned, some Member States (e.g. Austria, Belgium, Greece, Czech Republic, Lithuania, Poland, Romania, Slovenia) have moved beyond the Directive's provisions and introduced multiple damages awards. Such multiple (mostly double) awards are available for copyright (and rights related to copyright) infringements or for infringements committed in bad faith.

In this paper, the term ‘intellectual property rights’ is deemed to cover all rights set out in the "Statement by the Commission concerning Article 2 of Directive 2004/48/EC of the European Parliament and of the Council on the enforcement of intellectual property rights (2005/295/EC)". OJ L94, 13.04.2005, p. 37. These include copyright, rights related to copyright, sui generis right of a database maker, rights of the creator of the topographies of a semiconductor product, trademark rights, design rights, patent rights (including rights derived from supplementary protection certificates), geographical indications, utility model rights, plant variety rights and trade names, in so far as they are protected as exclusive property rights under the national law concerned.
At the same time, several voluntary provisions of the Directive have not been implemented by the Member States. It has been observed that these cases are more numerous than those where Member States provided for stricter measures. As an example, many Member States have opted for non-transposition of the alternative measures provided for in Article 12 of the Directive (e.g. Austria, Belgium, France, Luxembourg, the Netherlands, and Slovenia). Likewise, many Member States (e.g. Czech Republic, Greece, Hungary, Malta, and Poland) have opted for non-implementation of description orders (Article 7(1)), which are often available in criminal proceedings only.

2.2. General provisions (Articles 3 to 5)

As a procedural law, the Directive shall not affect substantive law on intellectual property, Member States’ international obligations (notably the TRIPS Agreement4) including Member States provisions on criminal law.

Article 3 introduces the general principle that Member States shall provide for fair and equitable measures, procedures and remedies to ensure the enforcement of the intellectual property rights covered by this Directive. These measures, procedures and remedies shall also be effective, proportionate and dissuasive and shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.

Articles 4 deals with the persons entitled to have access to courts in order to seek application of the measures, procedures and remedies laid down in the Directive. This group not only includes the right holders but also all other persons authorised to use those rights, especially licensees, as well as collective rights management bodies and professional defence bodies. While the former had already been protected by Member States' laws before the Directive was adopted, a majority of Member States had to amend their legislation to include professional associations established for the protection of intellectual property rights.

Article 5 governs the presumption of authorship or ownership. This provision is based on the wording of Article 15 of the Berne Convention5 and, in addition, extends it also to the owners of related rights. Requiring detailed and complex proof of copyright in the past often caused substantial delays or proceedings and lead to inefficient judicial proceedings. Article 5 therefore introduced a mechanism providing that, in the absence of proof to the contrary, it is sufficient for the name of the author to appear on the work "in the usual manner", which is also applicable to the holders of rights related to copyright with regard to their protected subject matter.

This tool turned out to be particularly helpful for the various rightholders to fight against infringers' attempts to delay artificially the proceedings, in some cases without appropriate evidence, by denying the ownership of copyright holders. It allowed namely phonogram producers to initiate court proceedings on behalf of various right holders more easily. Furthermore, some rightholders reported that the presumption has made it easier to obtain cease-and-desist declarations from infringers, and has therefore had the effect of reducing the number of court proceedings. A majority of Member States had to adapt their legislation to


5 Berne Protection for the Protection of Literary and Artistic Works of 9 September 1886.
this provision, in particular by stating that the name appearing on the work shall be admissible as proof of the holder of the right.

2.3. Gathering of Evidence and Measures to Preserve Evidence (Articles 6 and 7)

Articles 6 and 7 of the Directive set out a number of obligations on Member States with regard to gathering of evidence and measures to preserve evidence. The aim of these measures is to produce evidence of the infringement to courts, even where it is not in the possession of the right holder. This evidence includes information on the infringing products, on the means of production, the extent of the infringement etc., i.e. all the information that is indispensable for establishing an infringement of an intellectual property right.

2.3.1. Evidence gathering and preservation for all infringements of intellectual property rights

Article 6(1) lies down that if the rightholder has presented reasonably accessible evidence sufficient to support his claims and has, in substantiating those claims, specified evidence which lies in the control of the opposing party, the competent judicial authority may order that the opposing party produce evidence under its control. This provision was partly inspired by Article 43 of the TRIPS Agreement but in addition enables Member States to provide that courts may consider a sample of copies to constitute sufficient evidence for the entire infringement (so called 'sampling'). It has to be noted that sampling was already known in some Member States before the adoption of the Directive but was a novel provision in a large majority of Member States. In a large number of Member States, stakeholders acknowledged that the possibility of using sampling led to an improvement in enforcing intellectual property rights, especially for the protection of copyright.

Article 7 requires that the Member States shall, even before the commencement of proceedings on the merits of the case, order prompt and effective provisional measures to preserve relevant evidence, subject to the protection of confidential information. Such measures may include the detailed description (search), with or without the taking of samples, the physical seizure of the infringing goods and, in appropriate cases, of materials and implements used in the production and/or distribution of these goods and the documents relating thereto. Where necessary, these measures shall be taken without the other party having been heard. They shall be revoked or cease to have effect if the applicant does not initiate, within a period specified by the Directive, proceedings leading to a decision on the merits of the case before the competent judicial authority. In that case or where the infringement of the intellectual property right was not established in the judicial proceeding, the judicial authorities shall have the power to order the applicant to provide the defendant with an appropriate compensation for any injury caused by those measures.

As far as Articles 6 and 7 are concerned, the Directive goes beyond the TRIPS agreement but it also follows a Member States' best practice approach in the sense that it was inspired by those national provisions which proved to be effective for the enforcement of intellectual property rights. For example, Article 6(2) was based on the so-called 'Mareva injunction' in

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6 E.g. France, Hungary.
7 The possibility of using sampling was introduced in Germany for instance only in 2008.
8 Such feedback was received e.g. from stakeholders from Cyprus, Germany, Italy, Lithuania; Poland (for trademarks), Romania.
the UK and in Ireland. Similarly, Article 7 was largely inspired by the practices in some Member States such as the UK ('Anton Pillar order')\textsuperscript{10} or France ('saisie-contrefaçon')\textsuperscript{11}.

In a number of Members States, the Directive's rules on the presentation and preservation of evidence have lead to important changes in their national legislation.\textsuperscript{12}

Many Member States have, however, not made use of the options provided for by Article 7 of the Directive. One example are description (search) orders (Article 7(1)) since this measure is more common in the context of criminal proceedings than for civil ones. Likewise, the protection of witnesses' identity (Article 7(5)) in Member States is often used rather in criminal than in civil proceedings. For some other Member States, this type of measure was already part of the general procedural laws and was therefore not transposed specifically with a view to proceedings on infringements of intellectual property rights. As far as 'sampling' is concerned, it appears from information provided by stakeholders that, despite it being a voluntary provision, it has been implemented in a vast majority of Member States.

In practice, problems concerning evidence gathering and preservation have been observed in a number of areas. Thus, stakeholders and in particular legal practitioners report that cross-border collection of evidence in the context of judicial proceedings remains difficult. There are different ways to improve the collection of evidence across borders. A first way could be to improve the rules on jurisdiction of the courts to issue provisional, including protective measures, so as to ensure that they cover protective orders aiming at obtaining information and evidence as referred to in Articles 6 and 7 of the Directive. Another way could be to ensure that when a court is faced with a measure granted by a foreign court which is not known in its own State, it shall, to the extent possible, adapt the measure to one known under its own law. Finally, it could be very useful to improve the free circulation of measures ordered ex parte within the European Union. Necessary steps in this regard are being undertaken in the context of the upcoming revision of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation).

Gathering evidence in relation to the infringements committed via the Internet is becoming another significant problem. The relative anonymity of the Internet makes it often difficult to pursue the infringers. Infringers (such as sellers or owners of the websites selling/facilitating the sale of the infringing items) cannot be properly identified. Evidence in a digital form is hard to preserve and images reflecting the content of a webpage at a certain moment (so-called 'screenshots') are often not accepted by the courts as sufficient evidence. This has led several Member States to concluding, in their reports addressed to the Commission, that greater attention needs to be given to the infringements of intellectual property rights on the Internet and that the Directive does not sufficiently address this constantly growing, serious problem.

\textsuperscript{10} Anton Piller KG v Manufacturing Processes Limited [1975] EWCA Civ 12). In Ireland, the so-called Anton Pillar Order was formalised by law.

\textsuperscript{11} In France and in Belgium, before the transposition of Directive the well known procedure called "saisie-contrefaçon" was only available for the certain intellectual property rights such as patents, trademarks and designs. This procedure is now available for all intellectual property rights, including geographical indications.

\textsuperscript{12} E.g. Estonia, Lithuania and Slovenia.
Another measure which is not uniformly applied in the Member States relates to Article 6(1) according to which "if the rightholder has presented reasonably accessible evidence sufficient to support his claims and has, in substantiating those claims, specified evidence which lies in the control of the opposing party the competent judicial authority may order that the opposing party produce evidence under its control". This provision is interpreted restrictively in some Member States\(^{13}\), and rightholders who ask for evidence which lies in the control of the opposing party, are frequently requested to specify the exact character, location, reference numbers and contents of the requested documents, sometimes even the page numbers of the defendant's commercial records. Where rightholders are not able to provide this information the requests are rejected by the courts as 'vague'. Stakeholders reported about a similar situation in relation to the right of information (Article 8). This practice of some courts reduces the effectiveness of Article 6 of the Directive to a considerable extent. Another issue which has arisen is how broad the term "control" should be interpreted; whether the disclosure obligation requires the person to disclose only evidence in its possession, whether this obligation extends to all information under its control (a term which is broader than 'possession') and/or whether the person is even required to undertake a reasonable search for evidence. The practices of the courts vary in this respect but the majority of the courts seem to limit the extent of the disclosure to the items in the possession of the person(s) who is (are) required to disclose. It could be useful to give more concrete guidance as to how the term 'control' should be interpreted.

2.3.2. Evidence gathering in the case of infringements committed on a commercial scale

Under Article 6(2), Member States' judicial authorities shall have the possibility to order the communication of banking, financial or commercial documents which are under the control of the opposing party, in case of an infringement committed on a commercial scale\(^{14}\), subject to the protection of confidential information. This is a provision that goes beyond TRIPS, which does not contain any provision on this subject. The Directive, however, does not contain a definition of the term 'commercial scale'.\(^{15}\) Several Member States transposed this article without adding any legal definition of the term 'commercial scale', which is therefore left to the interpretation by the courts.\(^{16}\) Only in few Member States the law provides for a definition of this term.\(^{17}\) The definition is often given by using the notion of "commercial purpose" and defining it as "purposes aimed at direct or indirect economic or commercial gain" or similar.\(^{18}\) These definitions are probably directly inspired by Recital 14 of the Directive according to which "acts carried out on a commercial scale are those carried out for direct or indirect economic or commercial advantage; this would normally exclude acts carried out by end consumers acting in good faith". Other Member States have decided not to limit these measures to cases of commercial scale and

\(^{13}\) E.g. Greece.

\(^{14}\) Also Articles 8(1) - right of information (in case the request is not directed towards the infringer) - and 9(2) - seizure of the movable and immovable property, including the blocking of the infringer's bank account and other assets - are limited to the case of infringements committed on a commercial scale.

\(^{15}\) Recital 14 of the Directive however states that that acts carried out on a commercial scale are "those carried out for direct or indirect economic or commercial advantage and that this would normally exclude acts carried out by end-consumers acting in good faith".

\(^{16}\) E.g. Cyprus, Estonia, Hungary.

\(^{17}\) E.g. Germany, Czech Republic, Romania, Slovenia. Italian scholars seem to conclude that "on a commercial scale" means "in the course of trade".

\(^{18}\) Different e.g. Germany for copyright infringements ("number or severity of infringements").
allow communication of banking, financial or commercial documents for all infringements of intellectual property rights.\(^{19}\)

2.3.3. Evidence and protection of confidential information

According to Article 6(1), Member States shall ensure that, on application by a party which has presented reasonably available evidence sufficient to support its claims, and has specified evidence which lies in the control of the opposing party, the competent judicial authorities may order that such evidence be presented by the opposing party, \textbf{subject to the protection of confidential information}. Also, in case an infringement is committed on a commercial scale, competent judicial authorities shall be in a position to order communication of banking, financial and commercial documents which are under control of the opposing party, \textbf{with the exception of confidential information} (Article 6(2)). Likewise, when ordering provisional measures, such as description, seizure or an injunction, due regard must be given to the protection of confidential information (Article 7(1)). Also, the right of information shall be "without prejudice" to the provisions which govern the protection of \textbf{confidentiality of information sources} or the processing of personal data (Article 8(3)(e)). It appears that Member States have not specifically transposed provisions related to the protection of confidential information claiming that their previous laws contained sufficient safeguards to protect confidential information.

This restriction has shown to be particularly relevant when commercial (trade) secrets or know-how are at stake. The burden of proof usually lies with the plaintiff but some evidence needed to establish the infringement or its scale is controlled exclusively by the (alleged) infringer. In such cases it appears that the courts often find it difficult to assess and balance the rightholder's interest in the information and the alleged infringer's interest in protecting confidential information in order to prevent abuse, in particular when the parties at stake are competitors. Member States' practice, on the one hand, shows that the protection of confidential information does not mean that access to confidential information cannot be part of provisional measures. On the other hand, access to the confidential information through provisional measures (by a search, seizure or an injunction) appears to be allowed only in cases where this information is truly necessary and where this information cannot be obtained by way of other (legal) means. Furthermore, a special procedure (e.g. hearing closed for the public) is usually applied when such confidential information is to be disclosed including limitation to use this information only for the purposes of the proceedings. On the basis of the currently available information, the Commission is not in a position to judge whether this situation presents an obstacle to an effective enforcement of intellectual property rights. Therefore, more information on this matter including clarification of the conditions as to when and how, according to the jurisprudence of the national courts, such confidential information may be disclosed would appear to be useful.

2.4. Right of Information (Article 8)

Article 8 of the Directive requires Member States to enable the competent judicial authorities to order that information be provided by the infringer or another person on the \textbf{origin and distribution networks} of the goods which infringe intellectual property rights. The scope of the group of persons that can be forced to provide the information goes \textbf{beyond the infringer}. It is extended to any other person who was found in possession of the infringing goods on a

\(^{19}\) For instance, in France, Poland and in Denmark this condition has not been implemented and the access to banking, financial or commercial documents is left to the appreciation of the court without this limitation. It has to be noted that in France the non-transposition of this condition is, according to the French Parliament, due to the difficulty to define properly the notion of "commercial scale".
commercial scale, or was found to be using the infringing services on a commercial scale or was found to be providing on a commercial scale services used in infringing activities or was indicated as being involved in the production, manufacture or distribution of the goods or provision of the services. Such information may be requested also from other actors like intermediaries, for example Internet service providers, transporters or online market places. It is important to note that this provision, due to its limitation to activities carried out on a commercial scale, does not apply to consumers.

The information shall comprise, firstly, the persons involved in the infringing activities. In this context, it is essential not only to identify the persons at the end of the distribution chain, but also to detect those who are "behind the scenes", often as part of complex distribution networks. Secondly, the provision allows gathering information about the quantities produced including the price obtained. This article substantially supplements Article 47 of the TRIPS Agreement, which gives the TRIPS members only an option to provide that the judicial authorities are competent to order the infringer to inform the right holder of the identity of third persons involved in the production and distribution of the infringing goods or services and of their channels of distribution.

2.4.1. The impact of the right of information on the legislation and the jurisprudence in the Member States

In some Member States the right of information towards the alleged infringer already existed before the adoption of the Directive. However, the right to obtain information from third parties not directly involved in the proceedings seems to have been a novel in most Member States. Some Member States provide for the right of information only in the context of judicial proceedings, as foreseen by the Directive, other Member States have gone beyond the Directive and provide for a right of information even before the formal proceedings, as a provisional measure. Some Member States seem to provide for the right of information only in cases of infringements committed on a commercial scale. The other Member States have moved beyond the Directive and provide for the right of information for all infringements. At least in one of these Member States, this solution was chosen because the legislator wanted to avoid the problems related to the interpretation of the commercial scale criterion. In some Member States (it appears that when the information request is directed towards a third party, the commercial scale requirement is applied but such requirement is not imposed in case the information is requested from the alleged infringer.

After the transposition of the Directive, national courts have seen a significant increase in requests for information. Member States and stakeholders seem to agree that this provision has improved the ability to trace infringers considerably and has facilitated a better knowledge of the infringers. Furthermore, this provision has had a significant impact on the possibilities to establish the "exact quantities of infringing products involved" and therefore on the accuracy of the calculation of damages. At the same time it appears that some rightholders find it difficult to establish that the infringer has acted on a commercial scale without having obtained information from the Internet service provider, in particular on different IP addresses.

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20 This was the e.g. case in the UK where, in addition to Mareva injunction and the Anton Pillar Order, the so-called "Norwich Pharmacal order" was in place.
21 In France.
22 E.g. Belgium, Germany, Hungary, Luxemburg, Poland.
23 E.g. Sweden.
used by the same infringer. In general, many requests for information from third parties seem to be directed towards Internet service providers.

2.4.2. Conflicts between the right of information and the right to privacy

The right of information has become an important tool for the rightholders to pursue infringers, and frequent use of this tool by the rightholders proves this. Also the possibility of intermediaries to share the data with the rightholders would be an important element in this context. In certain areas, it however appears, that the right of information by the right holders is limited because of the national provisions on the protection of personal data. In some Member States (e.g. Spain, Austria) it seems that the disclosure of the relevant information is practically impossible in both criminal and civil proceedings. This is in particular the case for IPR infringements committed via the Internet such as illegal file-sharing of protected works through peer-to-peer protocol where Internet service providers may often not be in a position to disclose alleged infringers’ identities and contact details to rightholders even in the context of judicial proceedings because of the privacy laws and the protection of personal data. The situation is even more complicated if the request for information is made before the start of judicial proceedings.

The question that arises is how to strike the balance between the fundamental right to property (which includes the protection of intellectual property) on the one hand and that to privacy on the other. The need to balance the various rights was emphasized by the European Court of Justice which stated that Community law requires a fair balance to be struck between the various fundamental rights protected by the Community legal order and that the authorities and courts of the Member States must not only interpret their national law in a manner consistent with the directives but also make sure that they do not rely on an interpretation which would be in conflict with those fundamental rights or with the other general principles of Community law, such as the principle of proportionality.

In those Member States where privacy laws currently prevail over the right to (intellectual) property it can be difficult for the rightholders to make effective use of their right of information. However, the European legal framework on the protection of personal data/privacy on the one hand and enforcement of intellectual property rights on the other is

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24 In Spain, data may only be disclosed for the purposes of prosecution or investigation of serious criminal offences (infringement of intellectual property rights do not seem to fall within this category), and any extension would be illegal unless it would be embedded in the law. In Austria, the reform of the criminal procedure removed the possibility to bring a private criminal action ("Privatanklage") without knowing the identity of the infringer. The only possibility for rightholders now seems to be to launch a civil information claim under copyright law, which is not effective in case of temporary IP addresses. Study on Online Copyright Enforcement and Data Protection in Selected Member States, Hunton & Williams, November 2009 available at: http://ec.europa.eu/internal_market/iprenforcement/docs/study-online-enforcement_en.pdf.

25 Article 17(2) of the Charter of Fundamental Rights of the European Union states that intellectual property shall be protected.

26 Articles 7 and 8 of the Charter of Fundamental Rights of the European Union.

27 Judgment of 29 January 2008 in the case C-275/06 Productores de Música de España (Promusicae) v Telefónica de España SAU; judgment of 19 February 2009 in the case C-557/07 LSG-Gesellschaft zur Wahrnehmung von Leistungsschutzrechten GMBH v Tele2 Telecommunication GMBH.

neutral, in that there is no rule that would imply that the right to privacy should generally take precedence over the right to property or vice versa. National laws implementing the various directives must therefore be construed in a way allowing a balance to be struck between these rights in each case in order to guarantee that the provision on the right of information can protect the rightholders effectively without compromising rights relating to the protection of personal data. Further evaluations could be needed on the extent to which Member States' laws and the way they are applied are consistent with these requirements. If necessary, means could be considered to remedy the situation and to strike an appropriate balance between the rights at stake.

Another obstacle faced by the rightholders when requesting information appears to be linked to the retention of the relevant data by intermediaries. Again, this problem seems to be most relevant in cases of infringements committed via the Internet. Often the data which are requested (for example from the Internet service providers or Internet platforms) have not been stored, or by the time the request for information is delivered, the data have already been erased. Currently, data retention is dealt with at EU level only in the Data Retention Directive\(^29\) and in the e-privacy Directive\(^30\).

Finally, the fact that certain types of information (e.g. clinical data) may be subject to different confidentiality regimes in different countries causes additional problems for rightholders. These differences lead to uncertainties as to whether information legally obtained in one country may be used in another country where it falls under confidentiality rules, and vice versa.

2.5. Injunctive relief (Articles 9 and 11)

2.5.1. Interlocutory injunctions (Article 9)

2.5.1.1. General issues

Article 9 of the Directive obliges Member States to ensure that rightholders are in a position to apply for an injunction against the infringer aimed at prohibiting the continuation of the infringement (‘interlocutory’, ‘interim’ or ‘temporary’ injunction).\(^31\) It appears that injunctions against infringers were not new to Member States' legal systems and seem to have been widely used in the Member States even before the adoption of the Directive. Non-compliance with an injunction is sanctioned by a fine to be paid to the plaintiff\(^32\) or to the court\(^33\) or by criminal sanctions in some cases. The reports received from the Member States suggest that for most of them experiences with interlocutory injunctions have been rather positive. With some exceptions, interlocutory injunctions generally seem to be granted rather quickly by the courts and they often lead to a settlement between the parties so that the proceedings on the


\(^{31}\) This provision was partly inspired by Article 50 of the TRIPS agreement. However, an important addition to TRIPS is that such injunctions shall also be available against intermediaries whose services are used by a third party to infringe an intellectual property right.

\(^{32}\) E.g. the Netherlands.

\(^{33}\) Germany, Slovak Republic and the UK.
merits of the case can be avoided. For most stakeholders, due to the length of the judicial proceedings involving infringements of intellectual property rights and the costs of the proceedings which are rarely reflected in the damages awarded in the main proceedings, interlocutory injunctions are the main enforcement remedy.

Despite this general positive assessment of the interlocutory injunctions, the information at hand suggests that the level of evidence required by the courts to grant an injunction differs significantly between Member States and, in general, is rather high. Whereas in cases of an infringement of a trade mark, design or copyright the 'obviousness' of the infringement may often be assumed, in cases of patent infringements this is rarely the case. Moreover, it appears that some courts sometimes are reluctant to order an injunction unless an infringement has actually been proven, as opposed to granting an injunction for preventative reasons. In these cases, the 'sufficient degree of certainty' that is required by the courts is higher than what applicants are able to establish in practise. Furthermore, in some cases, the accompanying costs appear to be rather significant, since such costs often comprise court fees, lawyers’ fees, bailiff's fee and in many cases also fees of (technical) experts.

2.5.1.2. Injunctions against intermediaries

The notion of 'intermediary' is understood broadly by the Directive and includes all persons "whose services are used by a third party to infringe an intellectual property right". This implies that even intermediaries who do not have a direct contractual relationship or connection with the infringer may be subject to these measures provided for in the Directive.

Nevertheless, there are still uncertainties as to which kind of intermediaries, regardless of their liability, may be subject to a specific measure when contributing to or facilitating an infringement.

Intermediaries who transport goods suspected of infringing intellectual property rights or infringing intellectual property rights (such as carriers, freight forwarders, shipping agents or postal services) may play an important role in controlling the spreading of counterfeit goods.

Internet service providers are also key players in the functioning of the online environment. They provide, inter alia, access to the Internet and interconnect the underlying networks and host websites and servers. Internet service providers, being the intermediaries between all the users of the Internet, on the one hand, and the rightholders, on the other, are often placed in a compromising position due to the infringing acts of their customers. For this reason, EU law already contains specific provisions concerning Internet service providers whose services are used to infringe intellectual property rights. Nevertheless, the current EU legal framework only harmonises certain limitations of liability in relation to Internet service providers where certain conditions are satisfied, whilst not affecting the possibility of Member States' courts or

34 In Finland, it seems to be rather difficult for the rightholders to convince the courts of the need for an interlocutory injunction, except in cases of clear online infringements.
35 Stakeholders indicate that such costs may vary between EUR 3,500 and 25,000, and in patent infringement cases up to EUR 40,000.
36 Therefore not only intermediaries used (directly) by the infringer are covered by the Directive, but also intermediaries used by a third party to infringe an intellectual property right.
37 E.g. in Sweden the notion of 'intermediaries' is limited to "anyone who contributes to the infringement".
administrative authorities, in accordance with Member States’ legal systems, to take action in individual cases38.

In the area of the sale of counterfeit goods over the Internet, feedback received from stakeholders indicates that intermediaries (for example online market places such as online shopping sites) have realized that the presence and the sale of counterfeit goods via their sites undermines their efforts to be regarded as a safe place to buy and sell products and that their reputation is tarnished. In many cases, these intermediaries therefore have adopted comprehensive policies on the protection of intellectual property rights which are clearly spelled out on their sites. These policies include sanctions for users which breach the rules, in particular for the repeat infringers, comprehensive notice and take-down processes and other tools that allow a timely elimination of illegal offers, the sharing of information with rightholders and reimbursement schemes for consumers who unintentionally bought counterfeit goods on their site.

All these measures have been applied without affecting the liability status of the intermediaries and have significantly contributed towards the elimination of counterfeiting on the Internet; however, problems remain.

**Injunctions against intermediaries** whose services are used by a third party to infringe copyright or related rights were already enshrined in Article 8(3) of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society39 (and subsequently in Article 11 (third sentence) of Directive 2004/48). However, it became clear after the implementation of Directive 2001/29/EC that some Member States interpreted this provision rather restrictively, as to only provide injunctive relief against intermediaries in the context of pending court proceedings or after the decision on the merits of the case, and not as a provisional measure.

To remedy this restrictive approach, Article 9 of the Directive applies to all intellectual property rights as a provisional measure, i.e. irrespective as to whether the formal court proceedings on the same case are pending or not but where, nevertheless, an alleged infringer is concerned. The article therefore introduced a new element which needed to be reflected through changes in national laws in almost all Member States. It results from Member States' reports that injunctions against intermediaries are used relatively often as the infringers are often unknown. It has been reported by the Member States and legal practitioners that injunctions against intermediaries often encourage the infringing party to engage in settlement discussions. Several Member States stressed the importance of interlocutory injunctions in cases related to the Internet. It was pointed out that one effect of the Directive was that new measures clarified that intermediaries (e.g. Internet service providers) also have certain responsibilities (and obligations) and that they cannot rely on "absolute immunity" when intellectual property rights are infringed. Injunctions have also been successfully used towards intermediaries in order to block access to the sites which facilitate works protected by copyright or related right without the consent of the rightholder.40

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40 In Denmark, injunction against Tele 2 A/S was granted by the court to block access to a Russian website. In another case in Denmark, DMT 2 A/S (now Sonofon A/S) was required by the court to prevent access to a popular website.
However, some Member States\textsuperscript{41} report that injunctions against intermediaries have been more difficult to apply due to difficulties to execute court orders against intermediaries who have not been parties to the proceedings.

Furthermore, it appears that in some Member States it is not possible to issue injunctions unless the liability of an intermediary is established. However, neither Article 11 (third sentence) of the Directive, nor Article 8(3) of Directive 2001/29 link \textit{injunctions with the liability of an intermediary}. Therefore, although Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market\textsuperscript{42} (hereinafter referred to as "the e-commerce Directive") provides certain exemptions in relation to the liability of intermediaries who provide information society services where certain conditions are satisfied, such exemptions do not prevent the possibility of granting an injunction against intermediaries covered by the scope of Articles 12 to 14 of the Directive. Injunctions against intermediaries are not intended as a penalty against them, but are simply based on the fact that such intermediaries (e.g. Internet service providers) are in certain cases in the best position to stop or to prevent an infringement. This interpretation is confirmed by Articles 12(3), 13(2) and 14(3) and by Recital 45 of the e-commerce Directive\textsuperscript{43} and Recital 59 of Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society\textsuperscript{44}.

As far as third parties are concerned, these are only addressed indirectly in Article 8(3) of Directive 2001/29 and Article 11 (third sentence) of Directive 2004/48 where Member States are required to ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right. The aim of the respective provisions of each those Directive is that injunctive relief can be granted against the intermediary irrespective whether there has been a determination of liability of the intermediary or the third party. Other than these provisions, third party liability has been left to the legal system of each Member State.

\textbf{2.5.2. Permanent injunctions (Article 11)}

Article 11 of the Directive requires that where a judicial decision confirming an infringement of an intellectual property right is taken, judicial authorities may issue an injunction ('permanent' injunction) \textit{against the infringer} aimed at prohibiting the continuation of the infringement. In the same way as temporary injunctions, permanent injunctions can also be issued \textit{against intermediaries} and they may be issued against them \textit{irrespective of the}
intermediaries' (potential) liability. Since injunctions against the infringers are reported as having been used by the Member States already prior to the adoption of the Directive, the Directive seems to have had a limited impact in this respect. Again, injunctions against intermediaries were a new element which had to be introduced into the national laws in almost all Member States.

2.5.3. Scope of the injunctions

The scope of the injunctions seems to be generally determined by the scope of the rights and/or the attacked infringement. The dictum of an injunction in the Member States differs in its degree of detail. Recently, certain problems in relation to the scope of the injunctions (both interlocutory and permanent) have arisen with a view to infringements committed through the Internet. In the music and film sectors, injunctions often tend to be 'title specific'. Rightsholders therefore have to provide a full list of titles when asking for an injunction and the injunction will normally relate only to the indicated titles, while infringements with a view to titles not contained in the list can continue. Similar problems seem to exist with a view to the sale of counterfeit goods via online marketplaces.

Diverging opinions on this issue have resulted in two requests for preliminary rulings being submitted to the Court of Justice of the European Union.

In case C-324/09 (L'Oréal v eBay) which concerns the sale of counterfeit goods via an intermediary who is an online marketplace, the referring UK High Court of Justice asked whether the injunction as described in Article 11 of the Directive should have been interpreted as requiring Member States to ensure that the trade mark proprietor could obtain an injunction against an intermediary to prevent further infringements of the said trade mark, as opposed to the continuation of that specific act of infringement, and if so, what the scope of the injunction would be.

In another case C-70/10 (Scarlet v SABAM) the referring Cour d'appel de Bruxelles asked the Court of Justice of the European Union whether the national courts may also issue an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right, to order an Internet service provider to introduce, for all its customers, in abstracto and as a preventive measure, exclusively at the cost of that Internet service provider and for an unlimited period, a system for filtering all electronic communications, both incoming and outgoing, passing via its services, in particular those involving the use of peer-to-peer software, in order to identify on its network the sharing of electronic files containing a musical, cinematographic or audio-visual work in respect of which the applicant claims to hold rights, and subsequently to block the transfer of such files, either at the point at which they are requested or at which they are sent. It also asked whether the principle of proportionality should be applied when deciding on the effectiveness and dissuasive effect of the measures sought.

Both procedures are currently pending before the Court of Justice of the European Union.

2.5.4. Cross-border injunctions

Cross-border injunctions pose different problems, depending on the nature of the intellectual property right that is being infringed.
In cases of infringements of the **Community trade mark**\(^{45}\), or of a **Community design**\(^{46}\), granting of such cross-border injunctions by the European Union trade mark courts (or European Union design courts) is foreseen by the law as these rights are unitary EU titles. Stakeholders, however, report that, in practice, cross-border injunctions are generally not granted by the courts of the Member States even in the case of these rights.

The situation is even more complex for infringements of **patent** rights, in the absence of a uniform title, i.e. an EU patent. In the late 1990s, some courts began to issue injunctions in cases of patents infringements which reached beyond the territorial boundaries of the respective jurisdiction. This “legal innovation” started in the Netherlands and was subsequently picked up by courts in various other countries. This judicial practice soon became rather controversial, with some national courts following the Dutch example (e.g. in Germany) while other courts (e.g. in the UK) refused to assume jurisdiction over foreign patents. From the perspective of patent-holders, cross-border injunctions were highly attractive since they lowered the cost of litigation and opened new avenues in terms of litigation strategy. Subsequently, the European Court of Justice issued rulings in two cases, which resulted in limiting to an important extend the practice of cross-border injunctions for patent infringements.\(^{47}\) The decision of the court in *Roche v. Primus and Goldberg* effectively strongly limited the possibility to bring proceedings against several patent infringers even if patents belong to the same group of companies acting in a coordinated manner in accordance with a common policy elaborated by one of them. However, a court having jurisdiction on the basis of the defendant's domicile (Article 2 of the Regulation 44/2001) may still have the power to issue injunctions with extra-territorial effect.

As regards granting cross-border injunctions in cases of **copyright** infringements, there does not seem to be an established jurisprudence. It could therefore seem useful to examine under which conditions such injunctions can be granted. A distinction between the rules of attributing jurisdiction could be made. While the jurisdiction of a court, when based on the place where the infringement causes harm, is limited to measures concerning its own territory, no such limitation exists when jurisdiction is based on the domicile of the defendant. In this later case, cross-border injunctions are not excluded.

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\(^{45}\) Article 103(2) of Council Regulation (EC) No 207/2009 on the Community trade mark reads: "A Community trade mark court whose jurisdiction is based on Article 97(1), (2), (3) or (4) shall have jurisdiction to grant provisional and protective measures which, subject to any necessary procedure for recognition and enforcement pursuant to Title III of Regulation (EC) No 44/2001, are applicable in the territory of any Member State. No other court shall have such jurisdiction."

The territorial scope of the measures ordered by a Community trade mark court, which finds that an infringement has been committed, is currently the subject of a request for preliminary ruling in the case C-235/09 before the Court of Justice of the European Union.

\(^{46}\) Article 90(3) of the of Council Regulation (EC) No 2002/6 on the Community design reads: “A Community design court whose jurisdiction is based on Article 82(1), (2), (3) or (4) shall have jurisdiction to grant provisional measures, including protective measures, which, subject to any necessary procedure for recognition and enforcement pursuant to Title III of the Convention on Jurisdiction and Enforcement, are applicable in the territory of any Member State. No other court shall have such jurisdiction.”

\(^{47}\) Judgment of 13 July 2006 in the case C-4/03 Gesellschaft für Antriebstechnik mbH & Co. KG v Lamellen und Kupplungsbau Beteiligungs KG (GAT v LUK); and judgment of 13 July 2006 in the case C-539/03 Roche Nederland BV and others v Frederick Primus, Milton Goldenberg (Roche v. Primus and Goldberg).
2.6. Corrective and Alternative Measures (Articles 10 and 12)

Article 10 of the Directive requires that the competent judicial authorities may order recall from the channels of commerce of goods which have been found to be infringing an intellectual property right, and in appropriate cases also materials and implements principally used in the creation or manufacture of these goods. Furthermore, their definitive removal from the channels of commerce or their destruction may be ordered. Such measures shall be carried out at the expense of the infringer.

2.6.1. Meaning and purpose of "recall and definitive removal of infringing goods from the channels of commerce"

As far as recall and definitive removal of infringing goods from the channels of commerce are concerned, these measures appear to have been new to most Member States' legislation on intellectual property. Only few Member States seem to have been familiar with this kind of measures from the legislation on consumer protection. However, rightholders seem to request these measures not very often. This may be due, to a large extent, to the limited enforceability of the measures, particularly when an infringer is no longer the owner of the goods which are to be recalled or definitely removed and therefore has no means to dispose of the goods (for example when the infringing goods have already reached consumers or, in certain cases, retailers). It has also been reported that the courts are rather hesitant to order recall or definitive removal of the infringing goods, in particular in cases where the goods reached the final consumers.

Furthermore, Member States have been using these measures in different ways. This may be partly due to the fact that the Directive does not define these two measures and does not define the difference between them. Most Member States seem to use 'recall' as a temporary measure, which maybe reversed following a final decision. Thus, recall seems to be used by the majority of the Member States when the goods are no longer in the possession of the defendant. The defendant then is usually ordered by the court to claim the goods back from its customers (wholesalers, distributors, retailers etc.). 'Definitive removal' indicates the finality of the ordered measure for most Member States, and in some Member States (e.g. France) an order for definitive removal is often used as a precondition for destruction. In some countries, recall and definitive removal are used without any distinction (e.g. Greece, Spain, and Romania). In Sweden a non-exhaustive list of measures, including those mentioned in the Directive has been introduced with explicit references to other measures, such as alteration or the taking into custody for the remainder of the term of protection. Finally, there seem to be different views as to whether these measures may be ordered by the courts only as a result of the proceedings on the merits of the case or also as a provisional measure. In some Member States (e.g. in Poland, Denmark), recall may be issued as a preliminary measure, before the proceedings on the merits are commenced. In Germany it has been reported by the stakeholders that according to the prevailing case-law, claims for recall or definitive removal may only be raised in proceedings on the merits and not in preliminary proceedings.48

The short time that has passed since the transposition of the Directive, in many Member States has not allowed to acquire sufficient experience, on the side of the courts, with the

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48 Although there are some other opinions saying that recall may be included into injunction claim, in case the infringers still control the infringing goods.
corrective measures, and especially the recall and definitive removal from the channels of commerce. This makes it difficult, at this stage, to determine their overall effectiveness.

2.6.2. **Destruction of the goods as a preferred corrective measure**

Generally, the destruction of infringing goods seems to be the preferred (and most commonly used) corrective measure. A court decision confirming an infringement normally is the necessary precondition. The destruction is provided for as a civil sanction, therefore the injured party must specifically request destruction (whereas in criminal and administrative proceedings it may be ordered by the competent court/administrative board *ex officio*). However, when the destruction of infringing goods is ordered in civil law proceedings, the question arises who should bear the costs of the destruction and the related costs of storage.

According to Article 10(2) of the Directive, these costs have to be born by the infringer (defendant). However, practice shows that these costs often have to be borne by the rightholders who then are given the right to claim reimbursement from the infringers (defendants). Moreover, when rightholders subsequently claim these costs from the infringer, the latter often turns out to be insolvent (in liquidation), which means that these costs cannot be recovered. In transhipment cases (e.g. external transit, customs warehousing etc.) the defendant is usually unknown. Good faith intermediaries/service providers are normally not ordered to pay the costs of the destruction (and related costs of storage), but there seem to be very few precedents in this respect. In Germany, it has been observed that intermediaries or service providers become subject to legal claims for destruction only, where they are either ‘interferer’ (*Störer*) or direct contributors to the infringement. It could seem reasonable to provide that when there is a decision on the merits of the case, the costs of destruction of infringing goods should be imposed by the court directly on the unsuccessful party.

2.6.3. **Secondary use of the goods infringing intellectual property rights**

The so-called secondary use of goods infringing intellectual property rights consists e.g. in the removal of the infringing sign, logo or trade mark from the goods, in its recycling or its donation to charity.

This issue is not harmonized by the Directive. Consequently, practices in Member States seem to differ considerably. In some Member States it seems that goods are destroyed only if their secondary use is not possible (e.g. Italy). In other Member States secondary use appears to be permitted only in exceptional cases, and there are Member States where secondary use of goods infringing intellectual property rights does not seem to be permitted at all (e.g. France, Greece, Slovenia). Additional information is needed in order to judge what role the secondary use of goods infringing intellectual property rights should play in the context of enforcement of intellectual property rights and whether further harmonization in this respect would be useful.

2.6.4. **Alternative measures**

From information received it appears that less than half of the Member States have implemented Article 12 of the Directive which provides for an option for Member States to introduce alternative measures in the form of a pecuniary compensation to the injured party

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49 An exception applies in particular for geographical indications where the perishable nature of certain products requires the possibility to order their rapid destruction.
if the person that infringed the intellectual property right acted unintentionally and without negligence, if execution of other measures would cause disproportionate harm and if pecuniary compensation appears reasonably satisfactory.\footnote{This article was implemented e.g. by Denmark, Estonia, Germany, Lithuania, Malta, Poland, Romania and Sweden.} Furthermore, in some of these Member States\footnote{E. g. Germany.} the conditions for an 'unintentional infringement without negligence' are interpreted very narrowly given that the standards to act with due care are set at a relatively high level.

2.7. Damages and legal costs (Articles 13 and 14)

Article 13(1) of the Directive requires Member States to enable the competent judicial authorities to order the infringer who knowingly, or with reasonable grounds to know, engaged in an infringing activity, to pay the right holder damages appropriate to the actual prejudice suffered by him as a result of the infringement. Where the infringer acted in good faith (i.e. without reasonable ground to know), Member States have the possibility to allow the judicial authorities to order the recovery of profits or the payment of damages, which may be pre-established (Article 13(2)). Article 14 requires that the reasonable and proportionate legal costs and other expenses incurred by the successful party shall be borne by the unsuccessful party, unless equity does not allow it.

Since the pecuniary value of intellectual property may be rather difficult to measure, also due to its 'abstract' nature, practice has shown that assessing damages for infringements of intellectual property rights is often complicated. Damages from sales of counterfeit goods over the Internet are even more difficult to assess, and it often happens that after having been discovered, infringers quickly re-appear under a different name. This situation has not changed significantly through the entry into force of the Directive. In most cases only slight adjustments of national laws governing the calculation and award of damages were needed to make Member States comply with the Directive. However, due to the relatively low number and the considerable length of the judicial proceedings, there is not yet an established case law on the evaluation and assessment of damages since the transposition of the Directive in the Member States. At the same time it seems that existing judgements have not been overly explicit and detailed on how awarded damages have been calculated.

However, most rightholders report to prefer quick provisional measures (e.g. injunctions) and not damages claims as the main enforcement remedy. The reasons for this are the high costs of the proceedings which are rarely reflected in the damages awarded and the length of judicial proceedings involving infringements of intellectual property rights. Therefore damages awards in intellectual property cases are not requested by rightholders as a matter of course.

2.7.1. Calculation of damages

The Directives provides for two possibilities for the judicial authorities to determine the amount of the damages:

(1) They can base the amount on the actual prejudice (e.g. the rightholder's lost profits, the infringer's unfair profits, moral prejudice and other negative economic consequences);
(2) Or they can award **lump sum damages** based on at least the *(single)* amount of royalties which would have been due if the infringer has requested authorisation to use the intellectual property right(s) in question (e.g. if an infringer had concluded a licensing agreement with a right holder).

2.7.2. *Wilful and negligent infringements and infringements committed in good faith*

It appears that all Member States provide for damages in cases of **wilful** or **negligent** infringements of intellectual property rights *(Article 13(1))*. However, some Member States also award damages for infringements committed in *good faith* *(Article 13(2)),* and therefore the mere existence of an infringement is a sufficient justification for the rightholder to claim damages. Certain specificities seem to exist for copyright infringements and for infringements of rights related to copyright where often good faith is irrelevant for claiming damages. This is different from patent infringements, where in some Member States damages may be claimed only for infringements committed intentionally.

Most Member States seem to award damages regardless of whether the infringement is committed on a **commercial scale,** and there is generally no overall limitation on damages.

2.7.3. **Damages appropriate to the actual prejudice suffered by the rightholder**

2.7.3.1. Rightholders' lost profits

When awarding damages, it appears that all Member States take the **rightholders' lost profits** into account. Lost profits are usually defined as profits which would have been earned by the rightholder, in the absence of the infringement, or which could have been justifiably expected (excluding the infringer's profits). Nevertheless, in some Member States it seems unclear, whether the price of the original product or the price of a counterfeit/pirated product *(which may be substantially lower in some cases)* should be taken into account when assessing the rightholder's lost profits. Moreover, lost profits can be difficult to prove, in particular where infringing activities undermine the value of legal sales. Extensive infringing activities often make the branded goods lose their 'exclusivity' which leads to a decline in consumer demand, damage to goodwill etc..

2.7.3.2. Infringers' profits

The **profits unlawfully made by the infringer ('unjustified enrichment')** constituted a new aspect for assessing damages in some Member States and it has been implemented into the national legislation in very different ways.

Many Member States require a rightholder to prove that profits were made with or as a result of the infringing products *(causal link)*. Infringers may sometimes make higher profits with the infringing products than the rightholders with their branded goods. Rightholders appear to find it very difficult to prove that they would have earned the same profits as the infringers, particularly where the infringers offer their products under conditions that significantly differ from those of the legal channels *(e.g. lower prices, lower manufacturing costs, absence of related services etc.)*. Furthermore, in some Member States it appears that infringers' profits can only be taken into consideration once, either as a recovery of unfair profits or as damages.

52 E.g. Slovak Republic.
(or part of damages), but not in a cumulative way. In other Member States the transfer of infringers' profits are awarded as an alternative, when the profits are higher than the rightholder's calculated damages (e.g. the rightholders' lost profits). Finally, in some Member States, in addition to damages, also the transfer of the infringer's profits may be ordered.

2.7.3.3. Moral damages and damages for negative economic consequences

With respect to moral damages (as part of immaterial damages) and damages for negative economic consequences (as part of material damages; for example price erosion, tarnishment of a trademark etc.), rightholders report that they are not requesting them as a matter of course, and that where such requests have been made they have only occasionally been successful. They also report that moral damages tend to be rather low.

Therefore, despite the fact that rightholders have the right to claim damages in these cases it seems that damages for negative economic consequences and moral damages are rarely used in practice. It appears that one of the main reasons for this is that proving such damages may be very difficult. However, Member States' laws are too recent and too few precedents exist as this stage to properly assess the implications of this provision of the Directive in practice.

2.7.4. Lump sum damages

Member States generally provide for lump sum damages calculated on the basis of the amount of royalties that would have been due if the infringer had sought an authorisation (licence) from the rightholder. Where a licence royalty is already fixed and used in the relevant sector, this amount will be used; if there is not an agreed royalty rate or where it is difficult to determine precise rates, often an estimated average royalty related to the specific type of business involved is used.

From information received it seems that there are doubts whether the criteria for the calculation of damages (damages appropriate to the actual prejudice suffered by the rightholder and lump sum damages) are alternative, and therefore leave a real choice to the judicial authorities, or whether the lump sum damages only come into play if the damage cannot be assessed according to the actual prejudice suffered. It appears that Member States' practice in this respect varies. In some Member States (e.g. Hungary, Latvia, Slovak Republic) it appears that lump sum damages are available only if damages cannot be calculated otherwise, for example in cases when the actual prejudice cannot be calculated precisely. In those cases, the amount of the damage is assessed on the basis of the principle of equity. In other Member States (e.g. the Netherlands, Poland), it seems that courts or parties can freely choose according to which criterion they assess the damage.

The wording of the Directive suggests the judicial authorities should be allowed to assess the damage according to the actual prejudice or to award them as a lump sum, as they consider more appropriate. It could also be desirable for the rightholders to be able to opt for one or the other method of calculation, depending on which is for them the most favourable.

53 E.g. Germany and Italy.
54 E.g. Benelux countries in cases of bad faith.
55 In Hungary, there seems to be an "upper" limit of HUF 1 million (approx. EUR 3,500) for moral damages awards.
2.7.5. More far-reaching national rules

It should be noted that, in respect of specific infringements (mostly infringements of copyright and rights related to copyright), a significant number of Member States\(^{56}\) appear to have gone beyond the minimum rules set out by the Directive by introducing lump sum damages set as multiple (mostly double) amounts of royalties (licensing fees) due. Furthermore, at least one Member State reports to provide for \text{punitive damages}.\(^{57}\)

2.7.6. Legal costs and other expenses

Most Member States did not need to implement this provision specifically as their previous civil procedural laws already covered the Directive's requirements. In principle, the successful party can recover costs of proceedings necessary for the effective protection or enforcement of intellectual property rights. However, the amount to be reimbursed can be reduced or eliminated in cases where the wins are only partial. Moreover, if the costs incurred are disproportionate or unnecessary, the courts can order a partial recovery of the costs.

The costs of litigation concerning intellectual property rights are often very high. This is partly due to the fact that in order to gather proper and reliable evidence, technical expert(s) (e.g. such as patent agents in patent cases or Internet investigator(s)) must be engaged by the rightholders. Moreover, the rightholders must sometimes do 'test purchases' in order to confirm an infringement of their rights or to gather evidence. Translations are often required, too. Furthermore, given the (often) cross-border nature of the infringing activities, experts from several jurisdictions may be required to assist. These costs are not always fully taken into consideration by the courts. In some jurisdictions, only the fees of the experts appointed by the court are reimbursed.

It appears that rightholders rarely are reimbursed all legal costs and other expenses they encounter to protect their rights in the proceedings concerning infringements of intellectual property rights. Stakeholders' consultation revealed the following, very different, experiences with the reimbursement of the legal costs in a successful litigation: 10-50% in Denmark, 'only a small percentage' in Greece, 30% in Italy, 10-30% in Luxembourg, 50% in Cyprus, 66%-100% in Romania, 'very low' in Spain, about 75% in Sweden, 50-70% in Austria, 80% in Ireland. The possibility of a 100% reimbursement was reported for Lithuania, Hungary, Slovakia and Austria for simple cases. Many stakeholders were not able to state the percentage because of inconsistent experience and disparate case-law (e.g. Latvia). One respondent (Slovakia) stated that lawyers' fees are substantially limited when the claims cannot be assessed in monetary terms (e.g. where the rightholder requests termination of the infringing activities).

To summarise, it seems that the reimbursement of legal costs and other expenses in a successful litigation usually remains far below the actual legal costs incurred.

2.8. Codes of Conduct

Article 17 of the Directive obliges the Member States to encourage the development, by trade or professional organisations, of codes of conduct at Union level that are aimed at contributing towards the enforcement of intellectual property rights.

\(^{56}\) E.g. Austria, Belgium, Czech Republic, Germany, Greece, Lithuania, Poland, Romania and Slovenia.

\(^{57}\) Slovenia.
In several Member States associations have made use of such a collaborative approach and have put in place national codes of conducts (voluntary arrangements) to combat counterfeiting and piracy. ⁵⁸ In some cases, such voluntary agreements became the basis for legislation. ⁵⁹ However, in other Member States such arrangements would seem not to be possible, mainly due to the restrictions imposed by privacy laws and protection of personal data, which prevent intermediaries (e.g. Internet service providers) to forward warning notices to the alleged infringers or to share information about the alleged infringer's identity outside the scope of judicial proceedings.

3. ABSENCE OF HARMONIZED PROTECTION OF INTELLECTUAL PROPERTY RIGHTS THROUGH CRIMINAL LAW

Counterfeiting and piracy appears to be increasingly linked to organised crime ⁶⁰ raising security and safety concerns and is also proven to be spreading over the Internet. Therefore measures taken against cybercrime at EU level should be seen as relevant and complementary to the legislative and non legislative measures taken and to be taken in the civil and criminal area.

Despite the fact that almost all Member States provide for criminal measures to protect intellectual property rights, the disparities between the national definitions of the kind and level of penalties for the various infringements of intellectual property rights may make it difficult to combat these infringements effectively.

The Commission is currently analysing to what extent protection of intellectual property rights through criminal law via a harmonized directive on criminal measures is necessary to supplement the enforcement of intellectual property rights through civil law. Absence of harmonisation in the area of criminal measures to protect intellectual property rights could be a serious obstacle and hinder cross-border cooperation between the law enforcement agencies.

Following this assessment, the Commission intends to present a new legislative proposal which would replace the 2006 proposal for a Directive on criminal sanctions ⁶¹.

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⁵⁸ In Estonia, it has been reported that a Memorandum of Understanding was signed between Estonian Organisation of Copyright Protection and several internet service providers to enable the removal of material that infringes intellectual property rights. In Denmark, internet service providers together with the Danish IT Industry Association (ITB) and the Telecommunication Industries in Denmark (TI) have agreed to collaborate on combating piracy on the internet and a Code of Conduct for internet service providers concerning the enforcement of intellectual property rights has also been agreed. Similarly in France, the "Charte de lutte la contrefaçon sur Internet" was signed between the French online market places and rightholders to advance the fight against the sale of counterfeit goods over the internet.

⁵⁹ For example "Élysée agreement for the development and protection of creative works and cultural programmes on the new networks" was a basis of the legislation which was adopted subsequently in France.


4. **CONCLUSION**

On the basis of the information available at this stage it can be concluded that the Directive has provided a solid basis for the enforcement of intellectual property rights in the internal market and led to considerable improvements of the legal frameworks in place in the Member States.

However, the analysis shows that some of the provisions of the Directive have led to diverging interpretations by the Member States and by the courts, and some of these provisions have not fully reached the objectives pursued by the Directive. At the same time, infringements of intellectual property rights have reached a significant level. The provisions concerned could therefore be clarified. Clarification could also be necessary in order to reinforce the dissuasive effect of the Directive and therefore its effectiveness.
Annex 1: The transposition of the Directive by the Member States and Member States' application reports

1. Transposition process

Few Member States transposed the Enforcement Directive on time, i.e. by 26 April 2006: only 5 Member States (Denmark, Hungary, Italy, Slovenia and the UK) complied with the deadline.

Most of the Member States were late with the implementation. 20 infringements for non-communications were recorded, namely against Austria, Belgium, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Greece, Ireland, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Slovak Republic, Spain and Sweden. Out of these, 15 cases were closed before reaching the stage of referral to the Court of Justice of the European Union. A referral was made for Germany, Luxembourg, Sweden, France and Portugal.

Subsequently, the case was withdrawn for France and Portugal. The last Member States to implement the Directive were Germany (July 2008), Sweden (April 2009) and Luxembourg (June 2009), after a decision confirming an infringement had been taken by the Court of Justice. Despite of having notified complete transposition, in the course of the works to draw up this report it turned out that Greece seems not to have implemented the Directive in its entirety yet, but only in respect of copyright and related rights.

2. Implementation Reports

Article 18(1) of the Directive obliges Member States to submit, three years after the expiry of the deadline for the transposition, a report to the Commission on the implementation of the Directive.

However, even by autumn 2010, not all national reports have been received by the Commission. Thus, Bulgaria and Spain did not provide any report. Greece provided an incomplete report covering only copyright and rights related to copyright. Some reports have been received by the Commission with a significant delay (e.g. the reports by Belgium and Sweden which were received in May 2010, Luxembourg and Portugal only sent their report in October 2010).

Furthermore, the completeness and the quality of these national reports appear to differ considerably. The late transposition of the Directive was, for some of reports, the main reason for this difference in quality. The most complete reports are reflecting in depth the national situation and contain statistical data including jurisprudence. Some Member States have also provided the Commission with information on stakeholders' perceptions. Such reports have been received by the Commission for example from Denmark, Estonia, Germany, Hungary, Ireland, Latvia, Lithuania, Poland and Slovenia.

From the other, less detailed reports, it was not possible to make a clear assessment of the implications the Directive has had on innovation and the development of the information society. Cyprus, France, Luxembourg, Malta, the Slovak Republic and the UK have provided reports with particularly limited information.
As a result, the Commission has not been able to engage in a critical economic analysis of the effects that this Directive may have had on innovation and the development of the information society.
Annex 2: Methodology for the Analysis

1. Information gathering from the Member States

The Commission's services have carefully examined the national implementation reports provided by the Member States and have integrated information contained in these reports into the text of the Staff Working Paper. Apart from the information contained in these reports, the Commission did not receive a substantial amount of additional information from the Member States' authorities, neither during the implementation period, nor after the transposition of the Directive into the national law. As a result, and because of the reasons mentioned above, the information received had to be complemented from other sources, in particular through consultation with rightholders, and in particular through the consultation of legal experts from the private sector who meet regularly in the legal subgroup that has been formed in the context of the European Observatory on Counterfeiting and Piracy.

2. Information gathering from the stakeholders

The legal subgroup formed in the context of the European Observatory on Counterfeiting and Piracy made an attempt to screen the implementation and the application of the Directive in all 27 Member States. It concentrated on the national legislation as well as the national court practices. The work was divided into several sections: damages and legal costs, corrective measures, evidence and right of information and injunctions, where four detailed questionnaires have been produced by the subgroup together with the Commission services. These questionnaires were subsequently forwarded to rightholders and legal practitioners in all Member States. Detailed responses are available at the website of the European Commission. The summaries of the responses also contain some conclusions and practical recommendations for improvement.

A substantial amount of information was gathered through bilateral contacts and consultation papers issued by the business associations. Commission services have also held a number of meetings with private sector stakeholders and with individual companies (in particular rightholders and intermediaries) on the operation of the Directive.

http://ec.europa.eu/internal_market/iprenforcement/observatory/index_en.htm
COUNCIL OF THE EUROPEAN UNION

Brussels, 4 February 2011

6141/11

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WORKING DOCUMENT

From: General Secretariat
To: Working Party on Intellectual Property
- Presidency questionnaire

Delegations will find attached a note, drawn up by the Presidency, to serve as a basis for the discussion at the Working Party on Intellectual Property on 21 February 2011.

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The conclusion of the Report is inviting Member States and the Council of Ministers to present their views on its contents before 31 March 2011. This feedback is supposed to assist the Commission in conducting a thorough impact assessment in preparation of an eventual amendment of the Enforcement Directive and any other future measures concerning the enforcement of intellectual property rights. Member States will also have the opportunity to share their experience in implementing the Enforcement Directive at an expert meeting organised by the Commission on 25 March 2011.

The Presidency, in an effort to facilitate discussions and to stress the Council’s commitment in the fight against counterfeiting and piracy by enhancing the enforcement framework of intellectual property rights while safeguarding the rights of all parties involved in IP-related legal disputes, proposes to conduct a structured debate at experts level, on the basis of the Commission’s Report and of the "Issues paper" contained in the Annex to this Note.

The objective of this "Issues paper" is to highlight those aspects of IP enforcement that still raise questions (be it practical or theoretical) despite harmonisation and to identify the points that may require clarification or additional legal measures, thus facilitating it for the Commission to evaluate the Enforcement Directive's application. The "Issues paper" covers all the issues raised in the Commission’s Report and endeavours to help Member States react to that Report in a focused and structured manner, while assisting the Commission in gathering feedback from Member States in a comparable format.
The Commission will give an oral presentation of its Report at the meeting of the Working Party on Intellectual Property on 9 February 2011. The subsequent meeting of the Working Party on Intellectual Property on 21 February 2011 will be entirely dedicated to a structured debate of the Report, on the basis of certain highlighted questions contained in the "Issues paper". At this meeting, delegations will be invited to present their preliminary views on these selected questions.

As regards the rest of the questions contained in the "Issues paper", delegations should submit their written replies and comments directly to the Commission, as the aim of the exercise is to channel structured contributions into the survey of the Commission in preparation of the expert meeting mentioned above.

Taking into account the Commission’s two Communications¹, the Council’s two Resolutions² and the European Parliament’s Resolution on enforcement of IPR in the internal market of 22 September 2010³, the Presidency deems it more instrumental to keep discussions at experts level, considering that, the political objectives in this field being sufficiently clear, no further political guidance seems to be called for at this stage.

Please note that only the questions highlighted in bold will be discussed at the Working Party meeting on 21 February 2011: the replies to the remaining questions should be included in the written contributions to be sent by Member States directly to the Commission.

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¹ Documents 12267/08 and 13286/09.
³ INI/2009/2178
Issues paper


1. Digital environment

1.1. Do you consider that IPR infringements over the Internet pose a problem that the current toolbox of Directive 2004/48/EC (Enforcement Directive) is not entirely suitable to handle?

1.2. What kind of specific measures are in your view suitable to combat such infringements? Which measures should be taken at EU level?

1.3. Is there a need to lay down rules regarding the liability of online service providers (and limitations thereto) in the Enforcement Directive beyond those already existing in Directive 2000/31/EC (Directive on electronic commerce)? If yes, is there a need to define the term “online service provider” in the legal framework of intellectual property?

1.4. Taking into account the types of data mentioned in Article 8(1) and 8(2) of the Enforcement Directive, is there a need to introduce explicit rules that enable authorities to order online service providers, regardless of their liability, to disclose information relating to individual subscribers who have allegedly committed IP infringement? If yes, what should be the preconditions and limits for such orders (e.g. infringement has to be on a commercial scale, only judicial authorities may order such measures, infringement proceedings have to be in progress, only certain types of data may be provided, limitations for safeguarding rights to privacy and protection of confidential data)? What should be the sanction for non-compliance with such orders? Should these measures be limited to IP infringements? (See also question 5.3.)

1.5. Taking into account the jurisprudence of the European Court of Justice, is there a need to amend the existing legal framework relating to the liability or legal obligations of online service providers (including search engines and online market places) whose services are directly used in infringing activities (not necessarily on a commercial scale)? If yes, which legal instrument should be amended (the Directive on electronic commerce, the Enforcement Directive or the Trade Mark Directive)?

1.6. In the case of online copyright infringements, does your law provide for the possibility of taking measures against websites facilitating such infringements or against advertisers financing such websites? Does your law provide for specific legal measures against P2P file sharing? Do you see a need for such measures to be included in the Enforcement Directive?
2. **Scope of the Directive**

2.1. Is there a need to apply some (or all) of the measures provided for in the Enforcement Directive also with a view to rights that currently are not covered by the Directive?  

2.2. How do you think issues like the protection of trade secrets and domain names and protection against parasitic copies (look-alike marketing) should be dealt with? Do you see them as being linked to IPR or do you consider them more an issue of unfair competition law? Would you see an added value of EU action in that area?  

2.3. Is there a need to provide a list of intellectual property rights in the Enforcement Directive? If yes, what should be the relation of this list to the scope of the Directive (exhaustive list, indicative list, minimum list)? Should such a list be included in the Articles or in the recitals? How should rights protected only by certain national laws be treated in such a list?  

3. **Evidence**

3.1. What are the limits of the provisional measures (e.g. search or seizure orders) in respect of confidential (private) information under your law? Have you encountered any difficulties in this respect?  

3.2. What are the conditions, under your law, to obtain banking, financial or commercial documents?  

3.3. Is there a need to ensure that  

(a) personal computers can be searched/seized in order to establish evidence for an IPR infringement committed via the Internet?  

(b) screenshots are accepted by courts as evidence for infringements committed via the Internet?  

3.4. Is there a need to clarify the term “under the control” relating to evidence in Article 6 of the Enforcement Directive?  

4. **Intermediaries**

4.1. Is there a need to introduce a common definition of intermediaries in the Enforcement Directive?  

4.2. Does your law contain specific provisions on injunctions against intermediaries, or do such injunctions have to be requested under the general rules? If there are specific provisions, what are these and are they used often?  

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4.3. Is there a need to clarify in the Enforcement Directive that not only permanent injunctions are available against intermediaries but also interlocutory injunctions? Should other provisional or precautionary measures be available against intermediaries (see also question 5.1.)?

4.4. Taking into account that certain measures are available against intermediaries even when they cannot be held liable for the infringing acts, is there a need to clarify the standing of an intermediary in IP infringement proceedings? Can an intermediary be deemed an “unsuccessful party” when an injunction is issued against it without establishing its liability for the infringement (e.g. relating to cost issues)?

4.5. Should intermediaries (transport service providers, Internet platforms, ISPs) be involved to a greater extent in the prevention or termination of IP infringements? If yes, what ways would you deem appropriate?

5. Right of information

5.1. Is there a difficulty in applying IP enforcement measures (especially rules on right of information) together with rules on data protection or right to privacy in your country?

5.2. What are the limits of the right of information in your country, in view of privacy issues? Is there a need to amend the Enforcement Directive (or other EU legal instruments) in order to accommodate such conflicts?

5.3. Is there a need to clarify that the right of information pursuant to Article 8 of the Enforcement Directive may also be invoked before the infringement (and, where appropriate, the acts having been carried out on a commercial scale) was established by the judicial authorities, i.e. that providing information may also be ordered as a provisional measure? Is the usefulness of this interpretation in strengthening the IP enforcement framework enough to outweigh that providing information is by definition “irreversible” and that in certain cases the addressees of such orders are third parties (intermediaries) not being party to the litigation?

5.4. Due to data retention laws, online service providers sometimes do not possess the requested information about the infringements (e.g. it was subject to deletion). At the same time this information might need to be provided when requested by the public authorities. How do online service providers in your country respond to such requests from the public authorities when they are no longer in the possession of the information needed?

5.5. Can information that in your country would normally be subject to the banking secrecy, be requested by using the right of information?
6. Commercial scale

6.1. Have you defined "commercial scale" in your country – either in law or by jurisprudence? If so, which is the definition that you have chosen?

6.2. Is the definition of “commercial scale” still appropriate in Recital 14 of the Enforcement Directive? Is there a need to have a definition at all, and if yes, should it be moved to the Articles of the Directive? Should the link between the commercial scale requirement and the right of information remain intact?

6.3. The criterion of “commercial scale” (as for its definition, see Recital 14 of the Enforcement Directive) applies to a limited number of specific cases: communication of banking or commercial documents [Article 6(2)], right of information towards intermediaries [Article 8(1)], and seizure of movable and immovable property and blocking of bank accounts as a precautionary measure [Article 9(2)]. For which of the above mentioned three situations do you consider the commercial scale criterion as necessary or useful? What risks do you see if this criterion were to be abolished?

6.4. If you have made the right of information subject to the commercial scale requirement, how do you deal with the problem that sometimes the rightholder needs additional information from an intermediary in order to be able to determine whether the infringement has been committed at a commercial scale?

6.5. If under your law commercial scale is not a precondition for ordering the measures concerned, has its absence lead to abuses, in certain areas, by right holders? If yes, which areas are affected?

7. Damages

7.1. Do you see a deficiency in the practice of awarding damages, i.e. in compensating the rightholder for damages suffered (including moral prejudice and lost profits)? If yes, is this deficiency due to the current wording of the Enforcement Directive? Would it help this deficiency if recovery of unjust enrichment was to be ordered as an objective sanction (i.e. not depending on the culpability of the infringer), or should unjust enrichment of the infringer and other economical consequences play a greater role in calculating damages?

7.2. In your judicial practice, what is the relationship between unjust enrichment and lost profits (i.e. royalties or license fees that would have been due in a contractual relationship)?

7.3. What is the legal situation under your law relating to the liability of legal persons (and the managers thereof for the acts carried out by the legal person)? Is there any IP-specific problem in this respect that could be tackled in the Enforcement Directive?
8. Corrective measures

8.1. In your judicial practice, what is the difference between “recall” and “definitive removal” from the channels of commerce? Is the fact that the infringer is no longer in possession of the infringing goods a factor in deciding which measure to apply?

8.2. Is there a need to clarify in the Directive the relationship between corrective and provisional measures?

8.3. Does it happen frequently that the infringer is not able to pay the costs of the destruction and that those therefore have to be borne by the State? Would you consider it justified to impose the costs for the destruction of counterfeit goods on the State where the destruction is in the public interest (in particular because these goods pose a risk to consumers' health and safety)?

8.4. Would it improve the situation if the Directive clarified that courts are entitled to impose the costs of destruction of the infringing goods directly on the infringer once the infringement is established?

8.5. Do you see a need to harmonise aspects of secondary use (e.g. for charity purposes) of infringing goods in the Enforcement Directive?

9. Other issues

9.1. If you have not implemented one or more optional provisions of the Enforcement Directive, what were the reasons for that?

9.2. What are the main problems of cross-border IP enforcement arising from the current rules on jurisdiction (especially Regulation 44/2001/EC, also known as Brussels I Regulation)?

9.3. What specific problems have you encountered in collecting evidence in cross-border cases?

9.4. Are you aware of any codes of conduct that have been signed either between different parties from the private sector or between parties from the private sector and the public sector? If yes, what was the form and subject of these codes?

9.5. What are the main risks for consumers under the current rules of the Directive? Would it affect consumers adversely if certain rights of the rightsholders were to be reinforced (in particular the right to information, the rules on collecting evidence etc.)?

9.4. Is there anything else that should be addressed in the review of the Enforcement Directive?