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COMMISSION STAFF WORKING PAPER
SUMMARY OF THE IMPACT ASSESSMENT

Accompanying document to the

**Proposal for a
REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

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

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SUMMARY OF THE IMPACT ASSESSMENT

The Impact Assessment accompanies the proposal for a Regulation of the European Parliament and of the Council entrusting the European Observatory on Counterfeiting and Piracy to the Office for Harmonisation in the Internal Market (Trade Marks and Designs).

1. PROBLEM DEFINITION

The EU's economic well-being relies on sustained creativity and innovation. Accordingly, the Europe 2020 Strategy¹ highlights the need to strengthen the EU's research performance, to promote innovation throughout the Member States, ensuring that innovative ideas can be turned into new products and services that create growth and quality jobs. Intellectual property rights (IPR) are vital business assets, which help to ensure that innovators and creators get a fair return for their work and investments.

The protection of IPR, which is guaranteed inter alia by the Charter of Fundamental Rights of the European Union (Article 17(2)), serves not only the interests of right holders but also those of the market at large. Thus, IPR facilitate the entry of newcomers into markets, allowing them to attract venture capital etc. Moreover, IPR protect consumers from being misled when acquiring products.

Over the last ten years, however, IPR infringements have increased significantly. In 2009, the OECD estimated that international trade in counterfeit and pirated goods accounted for USD 250 billion in 2007, which is larger than the national GDPs of 150 economies². Figures published by EU customs authorities reflect a clear increase in customs activity, with a rise in registered cases from 26,704 in 2005 to 43,572 in 2009, i.e. up by about 60% in five years.

Various other studies, originating from industry as well as from international organisations, confirm the steady growth of trade in counterfeit and pirated goods and conclude that it:

- significantly reduces investment in innovation and destroys jobs³;
- threatens the health and safety of European consumers⁴;
- creates serious problems for European SMEs⁵;
- results in tax loss revenues due to reductions in declared sales⁶;

¹ Communication from the Commission: Europe 2020 of 3 March 2010, COM(2010) 2020.

² OECD, Magnitude of counterfeiting and piracy of tangible products – November 2009 update, <http://www.oecd.org/document/23/0,3343>.

³ TERA Consultants, Building a Digital Economy: March 2010
<http://www.iccwbo.org/bascap/id35360/index.html>.

⁴ European Commission, Taxation and Customs Union Directorate General, 'Report on EU Customs enforcement of intellectual property rights - 2009',
http://ec.europa.eu/taxation_customs/customs/customs_controls/counterfeit_piracy/statistics/index_en.htm.

⁵ Technopolis (2007), 'Effects of counterfeiting on EU SMEs',
http://ec.europa.eu/enterprise/enterprise_policy/industry/doc/Counterfeiting_Main%20Report_Final.pdf

- is attractive to organised crime⁷.

In a recent study, commissioned by the International Chamber of Commerce and carried out in 2010, the indication was that EUR 10 billion and more than 185 000 jobs were lost due to piracy alone in the EU in 2008⁸.

Therefore, unless more coordinated and sustainable action is taken to combat infringements of IPR, the EU faces a damaging trend that will have a real impact on its economic recovery, wealth and jobs. This trend includes a rise in products that can potentially cause serious harm to consumers, such as fake medicines, food products, cosmetics, and fake household equipment. The results of a Eurobarometer survey carried out in 2009⁹ showed that one out of five EU citizens had, on at least one occasion, unintentionally bought a counterfeit product.

Successful enforcement of IPR requires an appropriate legal framework and measures ensuring the rules are effectively applied. Currently, the following shortcomings are particularly prejudicial to effective enforcement:

- Lack of reliable, objective data, due to the absence of an agreed methodology and practical tools to collect and analyse data in order to identify trends and threats in counterfeiting and piracy;
- Insufficient coordination and exchange between responsible authorities in the Member States on best practice, and real-time exchange of information between stakeholders on specific counterfeit products, trends and potential threats;
- Insufficient exchange on successful private sector strategies;
- Insufficient knowledge of persons involved in enforcement matters;
- Insufficient use of technologies to prevent counterfeiting;
- Insufficient awareness of consumers about the effects and dangers of counterfeiting and piracy; and
- Lack of expertise and structures in third countries to combat counterfeiting and piracy.

Without measures to address these shortcomings, the number of IPR infringements is set to grow.

At EU level, the primary initiative is the European Observatory on Counterfeiting and Piracy ('the Observatory'), which is administered by the Commission's Directorate General for Internal Market and Services (DG MARKT). The Observatory's functions were described by the Commission in its 2009 'Communication on enhancing the enforcement of intellectual

⁶ Frontier Economics, (May 2009), 'The impact of counterfeiting on Governments and Consumers': <http://www.iccwbo.org/uploadedFiles/BASCAP/Pages/Impact%20of%20Counterfeiting%20on%20Governments%20and%20Consumers%20-%0Final%20doc.pdf>.

⁷ UNICRI, Counterfeiting: a global spread, 2008, <http://counterfeiting.unicri.it/report2008.php>.

⁸ <http://www.iccwbo.org/bascap/id35360/index.html>.

⁹ Available at: http://ec.europa.eu/public_opinion/.

property rights in the Internal Market'¹⁰ as improving data collection, exchange of public and private best practices and awareness-raising.

In March 2010, a Council Resolution added a further task, namely to explore the need for EU-level training programmes for those involved in combating counterfeiting and piracy¹¹. In September 2010, a European Parliament Resolution called on the Observatory to further extend its work¹². Finally, a study commissioned by the Commission's Directorate General for Trade recommended that the Observatory should become a single point of contact within the European Commission and an international source of best practice¹³.

Over the last two years, the Observatory's institutional framework has been set up. However, due to a lack of funding, human resources, IT and meeting capacities and necessary expertise it does not have the appropriate infrastructure to run the required operational activities. The Impact Assessment therefore aims at identifying solutions for carrying out the activities that are needed to improve IPR enforcement at EU level.

2. SUBSIDIARITY

Many of the tasks assigned to the Observatory are of a cross-border nature, based on cooperation and coordination. To be fully effective, they require the engagement and involvement of all 27 Member States. Therefore it would be most beneficial to develop EU-level tools and structures, so that all Member States could benefit from the results.

Furthermore, in relation to third countries, there has to be coordination between Commission services and other EU and international agencies, and therefore an EU-level initiative would be the appropriate way forward.

3. OBJECTIVES

The general objective is to enforce IPR more effectively, in order to avoid significant harm being caused by counterfeiting and piracy to the European economy and to the health and safety of European citizens.

The specific objectives are to make public authorities and private stakeholders more aware of counterfeiting and piracy as regards their scope, impact and trends, and effective techniques to combat the problem and to improve day-to-day cooperation; to inform consumers of the economic impact and dangers related to counterfeiting and piracy and to help them avoid being misled into buying fake products; and to improve the coordination of actions directed towards third countries.

The operational objectives are to ensure that the Observatory has the necessary infrastructure (in terms of human resources, funding, IT and meeting capacities, expertise and independence

¹⁰ COM(2009) 467.

¹¹ Council Resolution of 1 March 2010 on the enforcement of intellectual property rights in the internal market (OJ C 56, 6.3.2010, p. 1).

¹² European Parliament Resolution of 22 September 2010, 2009/2178(INI).

¹³ ADE, Evaluation of the Intellectual Property Rights Enforcement Strategy in Third Countries, November 2010, http://trade.ec.europa.eu/doclib/cfm/doclib_section.cfm?sec=180&langId=en.

from vested interests) to perform its tasks effectively, as quickly as possible and at minimum cost to the EU budget.

These objectives dovetail with existing EU policies and strategies, such as Europe 2020¹⁴. They also fit in with the Commission's main priorities and proposals concerning its IPR strategy for Europe¹⁵.

4. POLICY OPTIONS AND ANALYSIS OF THEIR IMPACTS

Building on the baseline scenario (Observatory is run by DG MARKT with no increase in resources but with short-term support through an agreed Memorandum of Understanding with the Office for Harmonisation in the Internal Market – OHIM), three main options have been explored:

Option 1: The Observatory continues to be administered by DG MARKT, but with extra resources:

- Sub-option 1a – DG MARKT's human and budgetary resources are increased.
- Sub-option 1b – The management of the Observatory is outsourced to an external contractor.

Option 2: Tasks are performed by a private body or jointly under a public-private partnership:

- Sub-option 2a – Industry-led initiative, financed by private sector stakeholders.
- Sub-option 2b – Industry-led initiative, financed by a Commission grant/programme.
- Sub-option 2c – Public-private partnership (PPP).

Option 3: The Observatory is entrusted to an EU agency:

- Sub-option 3a – The tasks of the Observatory are entrusted to a newly created EU agency.
- Sub-option 3b – The tasks of the Observatory are entrusted to an existing agency.

Whichever option is chosen, the Commission will retain political control of EU IPR enforcement policies, which is considered to be one of its core tasks.

4.1. Baseline scenario: The Observatory is run by DG MARKT without any increase in resources

If no action is taken, the Observatory will be unable to continue delivering on its aims and the objectives will therefore not be reached. Given the need to maintain momentum and increase the Observatory's activities in the short term, the Commission is concluding a Memorandum of Understanding (MoU) with the OHIM, the European trade marks and designs Office. In

¹⁴ COM(2010) 2020.

¹⁵ COM(2008) 465.

this, the OHIM commits to providing support through certain activities already being carried out as ‘accessory activities’ to its core registration functions and limited to issues involving trade marks and design rights, in accordance with the OHIM’s remit. The MoU is of a temporary nature and would probably not be extended beyond the end of 2011 if a decision was taken to tackle the current problems of the Observatory by some means other than entrusting OHIM more permanently with the tasks of the Observatory.

4.2. Option 1: Increase of DG MARKT’s resources

Under **option 1a**, DG MARKT would continue to manage the Observatory but be provided with additional staff and budget. However, in this option, where the Observatory would remain within the Commission, OHIM would not be expected to continue its assistance in the long term.

In the Impact Assessment, it is estimated that the Observatory would require an operational team consisting of 25 people at cruising speed. In view of the Commission’s commitment not to request any new posts between 2009 and 2013¹⁶, such a rise in staff numbers seems unrealistic.

Under **option 1b**, DG MARKT would act as a supervising contract manager to one or more external contractors and coordinate the overall functioning of the Observatory.

However, there is a genuine risk that private stakeholders and public authorities would not be prepared to share sensitive data with an external contractor. Moreover, this option implies a considerable impact for the EU budget. It is estimated that between seven and ten different contractors, with specialised skills, would be required to carry out the Observatory’s work. The contracts would have to be managed by the Commission, leading to a total cost of between EUR 4.83 million and EUR 5.97 million / year in the first two years, and between EUR 5.26 million and EUR 6.18 million / year in the following years, depending on the design of the IT systems to be developed.

4.3. Option 2: The tasks are performed by an external body or jointly under a public-private partnership

Where the tasks are carried out through an industry-led initiative (**option 2a**), the same constraints would arise as under option 1b. Furthermore, there are no indications that the private sector would be able and willing to ensure the funding of such an initiative in the longer run.

Under **option 2b**, the tasks could be financed through a Commission grant. However, the disadvantages outlined for option 1b would be largely the same. Moreover, based on indicative contract costs, this method of financing would mean that the EU budget, in the first two years, would be burdened with lower-end costs of EUR 4.85 million / year, or EUR 5.99 million at the upper end, depending on the design of the IT systems to be developed, and between EUR 5.25 million and EUR 6.17 million / year from year three.

Option 2c (public–private partnership) avoids a number of disadvantages as the PPP contract would determine the level of influence of each partner and ensure continuous funding. The annual costs for the EU budget, based on an equal share for the Commission and the private

¹⁶ SEC(2007) 530.

sector, are estimated at between EUR 2.41 million and EUR 2.98 million /year in the first two years, and between EUR 2.61 million and EUR 3.07 million / year from the third year.

4.4. Option 3: The tasks of the Observatory are entrusted to an EU agency

Under **option 3a**, a specialised EU agency would be set up to carry out the tasks of the Observatory.

EU agencies have established administrative structures, and sustainable financial and human resources, and are therefore in general suited to carrying out tasks such as those of the Observatory. However, the number of staff required for the Observatory would not justify the creation of a new agency, in view of the considerable overheads. Thus, the estimated cost of this option lies between EUR 4.33 million and EUR 5.33 million / year for the first two years, and between EUR 5.5 million and EUR 6.28 million / year from year three. In addition, the Commission undertook in 2008 not to propose any new agencies for the time being¹⁷.

Furthermore, it would take several years to get a new agency fully up and running. This would impact severely on the Observatory's activities.

Under **option 3b**, the Observatory would be run by an existing EU agency. This would allow it to become quickly operational and to profit from existing administrative structures (e.g. human resources, IT and finances).

The Office for Harmonisation in the Internal Market (OHIM) is the EU agency dealing with trade marks and design rights and could be a suitable host for the Observatory. It has already established a basis of expertise in the enforcement area, through its training seminars and activities, and is planning to develop further enforcement projects, such as an IT information system on registered trade marks and designs.

Synergies between the tasks of the Observatory and those already carried out by the OHIM would significantly limit the number of additional staff required. Therefore, the total cost of this option is estimated at between EUR 3.3 million and EUR 4.3 million / year during the initial two years and between EUR 4.74 million and EUR 5.52 million from year three.

Finally, these amounts could be financed from the revenue that OHIM generates through its fees. Thus, the EU budget would not need to cover these costs and would even be freed from the costs of the activities that currently are carried out within the Observatory. These savings, for the EU budget, amount to about EUR 40,000.

¹⁷ COM(2008) 135.

5. COMPARISON OF OPTIONS

Table 1: Comparison of options

Assessment Options	Effectiveness (achievement of objectives)					Efficiency			Overall assessment
	Sustainable funding	Stable structure	Human resources	IT capacity	Independence from vested interests	Time needed	Overall costs	Implication for EU budget	
Option 0 (baseline scenario)	0	0	0	0	0	0	0	0	0
Option 1b	+	+	+	+	0	-	between EUR 4.83 million and EUR 6.18 million / year	between EUR 4.83 million and EUR 6.18 million / year	+
Option 2b	+	-	+	+	-	--	between EUR 4.89 million and EUR 6.21 million / year	between EUR 4.85 million and EUR 6.17 million / year	-
Option 2c	+	+	+	+	0	--	between EUR 4.89 million and EUR 6.21 million / year	between EUR 2.41 million and EUR 3.07 million / year	+
Option 3a	++	++	++	+	++	--	between EUR 4.37 million and EUR 6.32 million / year	between EUR 4.33 million and EUR 6.28 million / year	+
Option 3b (as regards OHIM)	++	++	++	++	++	-	between EUR 3.3 million and EUR 5.52 million / year	- EUR 0.04 million / year	++

Magnitude of effectiveness and efficiency: ++ strongly positive, + positive, 0 neutral, - negative, -- strongly negative, N/A not applicable.

As explained, option 1a (more staff in DG MARKT) is not feasible under the given circumstances. Options 1b (outsourcing on a commercial basis), 2a and 2b (tasks performed by industry-led initiative) are feasible, but are not suitable solutions since in particular the collection of sensitive information would pose considerable problems. These disadvantages could be partially avoided in option 2c (PPP), which however would impose on the EU budget annual costs of between EUR 2.41 million and EUR 3.07 million.

Option 3a (a new EU agency) offers solutions to allow the objectives to be delivered. However, this option would bring substantial costs for the EU budget and a significant time delay.

Option 3b (entrusting the tasks to an existing EU agency, preferably OHIM) would allow the Observatory to have access to expertise, resources and financing and to become quickly operational. In budgetary terms it would offer a cost-efficient solution and allow costs to be covered by financial resources outside of the EU budget.

Based on this comparison, option 3b is the preferred option.

6. MONITORING AND EVALUATION

Five years after the entry into force of the Regulation entrusting OHIM with the tasks related to the Observatory, the Commission would publish a report assessing whether the objectives pursued had been reached and whether new or different measures might be needed.