

Parliamentary **Assembly** **Assemblée** parlementaire



Doc. 11227
30 March 2007

Need for a Council of Europe convention on the suppression of counterfeiting and trafficking in counterfeit goods

Report
Committee on Economic Affairs and Development
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Summary

The traffic in counterfeit goods is a scourge that is growing to epidemic proportions across the wider Europe in both the range and volume of goods involved. All member states of the Council of Europe are concerned as countries of origin, transit or destination for counterfeit goods. This multi-billion euro problem can no longer be ignored as marginal given the extent to which it undermines public health, individual and collective security, economic growth, employment, innovation, investment, competition, tax income and the reputation of brand names.

The report shows how recent economic and political developments – such as the advent of the information society and the Internet, the spread of trade liberalisation and outsourcing practices, and easier access to sophisticated modern technologies – have opened new opportunities for the manufacturing and circulation of fake goods whilst a correspondingly frontier-free European judicial area still needs to be established. European countries thus face a double challenge: on the one hand, countering fakes that penetrate across Europe's external borders and via the Internet, and, on the other, intercepting counterfeit products made in Europe or in transit.

The report reviews the valuable work carried out by various national and European authorities and specialised organisations and notes the lack of a truly comprehensive and cross-sector strategy to fight counterfeiting in all its forms. The Council of Europe, given its multidisciplinary approach, its political and legal authority, and its pan-European membership, is ideally placed to rally European states in the preparation of a European convention on the suppression of counterfeiting and trafficking in counterfeit goods, covering civil and criminal law aspects of the problem. The report also calls for the organisation of information campaigns against counterfeiting, agreement on common technical means for detecting counterfeit goods and steps to reinforce the protection of intellectual property in Europe.

A. Draft recommendation

1. The Parliamentary Assembly recalls its earlier Recommendation 1673 (2004) on counterfeiting: problems and solutions, in which it expressed concern over the growing phenomenon of counterfeiting in Europe, pointing out substantial risks to public health and well-being and major losses incurred by the economies of the Council of Europe member states. This preoccupation is reflected in the general resolve of the member states at the 3rd Summit of Heads of State and Government of the Council of Europe in Warsaw to foster "good governance at all levels" with the aim of promoting stability and economic and social progress. This has so far found only partial expression in the Council of Europe's work, notably as regards counterfeit and sub-standard medicines.

2. The Assembly, in this context, also refers to the Declaration of the G8 on Combating IPR (Intellectual Property Rights) Piracy and Counterfeiting, adopted in St Petersburg on 16 July 2006. This statement reaffirmed the multilateral commitment to "strengthening individual and collective efforts to combat piracy and counterfeiting, especially trade in pirated and counterfeit goods", noted "that such efforts will contribute to the sustainable development of the world economy, including through innovations, as well as to health and safety of consumers all over the world" and urged enhanced co-operation "in that area among the G8 and other countries, as well as competent international organisations, notably the World Intellectual Property Organization (WIPO), the World Trade Organization (WTO), the World Customs Organization, Interpol, the Organisation for Economic Co-operation and Development (OECD), and the Council of Europe".

3. Given the accelerating pace of globalisation, counterfeiting, which forms a significant part of the shadow economy and accounts for up to 9% of world trade, is increasingly affecting European countries and is closely linked to organised crime networks. All member states of the Council of Europe are concerned as countries of origin, transit or destination for counterfeit goods. Not only fake medicines but also many other products, such as spare parts, toys, personal care products, electric appliances, foodstuffs, alcoholic beverages and other goods, when counterfeited, can endanger consumers' health and safety, seriously damage the European economy (especially through counterfeit brands) and nurture criminal networks. The Assembly believes that the time has come for the Council of Europe and its member states to tackle the problem of counterfeiting in a more comprehensive manner than has been the case until now.

4. There is an urgent need for action to raise awareness of the dangers that counterfeiting represents to the individual and collective safety of the public and to shape a coherent European policy for the prevention, deterrence and repression of counterfeiting. It is disturbing that counterfeiting remains a low-risk, high-profit activity as prosecution is cumbersome, sanctions are relatively weak and often difficult to apply, and inter-state co-operation is deficient. The Assembly welcomes the prospect of elaborating a European convention on the fight against pharmaceutical- and health-care-related crime and is convinced that a further similar initiative is necessary to fight all counterfeiting and trafficking in counterfeit goods.

5. The Assembly is aware of the highly valuable work in this field carried out by various national and European authorities and specialised organisations including the European Union, the European Patent Office (EPO), Europol, Eurojust, the European Anti-fraud Office (OLAF), the World Trade Organisation (WTO), the World Intellectual Property Organisation (WIPO), Interpol, the World Health Organization (WHO) and the International Chamber of Commerce (ICC). It notes, however, the lack of a truly comprehensive and cross-sector strategy to fight counterfeiting in all its forms.

6. The Council of Europe, given its multidisciplinary approach, its political and legal authority, as well as its pan-European membership, is ideally placed to motivate and mobilise European states to tackle the complex challenge and threat that counterfeiting represents. While a legal instrument with a global reach would undoubtedly be desirable, this would hardly be feasible given the urgency required and the high standards to which the European countries aspire.

7. Intellectual property, and in particular patents, provide crucial support for innovation and are essential for developing a competitive knowledge-based economy in Europe. Simplified patent procedures, lower patent registration fees and standardised dispute settlement mechanisms – as foreseen in the London Agreement and the European Patent Litigation Agreement framed under the aegis of the European Patent Organisation but not yet in force – are major steps towards providing better legal protection for innovation in Europe and remedying the shortcomings of the present cross-border litigations. They constitute a significant effort with regard to deterring counterfeiting and piracy, and merit the strongest possible support of the contracting parties.

8. Despite the commendable work of the customs services in protecting Europe's external borders against counterfeit goods produced in third countries, too many consignments, especially Internet deliveries, go unchecked, with the result that many counterfeit products slip through. Moreover, increasing quantities of counterfeit goods are made *in* Europe and are thus even more difficult to intercept before they reach end-users. Investigating a product's authenticity and origin, for the purpose of detecting and intercepting fakes, calls for more harmonised civil and criminal law procedures, as well as an enhanced technical arsenal, in line with strategic priorities to combat organised crime.

9. Reliable measurement of the real extent and impact of counterfeiting is essential in order to pursue adequate and pragmatic anti-counterfeiting action. For various reasons, currently available figures on counterfeiting (usually police and customs data on arrests and seizures, and industry estimates) illustrate the large-scale nature of the phenomenon and reveal certain trends, but are not detailed enough to underpin effective countermeasures, analysis of trends and policy adjustment. The establishment of an independent authority for statistical monitoring of counterfeiting in the Council of Europe member states should be envisaged.

10. The Assembly therefore recommends that the Committee of Ministers:

10.1. instruct the competent intergovernmental committee to work, in consultation with the European Union and other stakeholders, on the preparation of a European convention on the suppression of counterfeiting and trafficking in counterfeit goods, covering civil and criminal law aspects of the problem;

10.2. consider organising an information campaign on the dangers counterfeiting represents to European public safety;

10.3. urge member states to launch similar national campaigns against counterfeiting;

10.4. take the lead in shaping a coherent European policy designed to provide technical means for the prevention and deterrence of counterfeiting (especially regarding Internet deliveries), as an indispensable tool for gathering legal evidence and for the application of repressive measures against counterfeiters and traffickers;

10.5. urge member states of the European Patent Organisation to convene a diplomatic conference in order to adopt the European Patent Litigation Agreement and, for those which have not yet done so, to sign and ratify the London Agreement in order to ensure a smooth entry into force of that instrument.

B. Explanatory memorandum by Mr Bernard Schreiner, Rapporteur

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I. Introduction

1. Some two years ago the Parliamentary Assembly debated, for the first time, the rising phenomenon of counterfeiting on the basis of a report emanating from the Committee on Economic Affairs and Development (Doc. 10069). In its Recommendation 1673 (2004), the Assembly expressed concern over the rapidly increasing incidence of counterfeit goods in Europe and called for reinforced policies to combat counterfeiting through a series of targeted measures. Regrettably, the Committee of Ministers only indicated, in its reply to the Assembly's Recommendation 1673, that "apart from the Council of Europe activities on counterfeit medicines, the organisation is not presently active in this field".

2. While fully understanding – and strongly supporting – the work being carried out under the Partial Agreement Public Health Committee and the European Directorate for the Quality of Medicines and Healthcare, especially in the area of developing effective measures against counterfeit and sub-standard pharmaceuticals, your Rapporteur believes that the time has come for the Council of Europe and its member states to tackle the problem of counterfeiting in a more comprehensive manner. For not only fake medicines, but also many other products (such as spare parts, toys, personal care items, electric appliances, foodstuffs, alcoholic beverages, etc.) – when counterfeited – place consumers' health, safety and well-being at risk, as well as seriously damaging the European economy and nurturing criminal networks.

3. The traffic in counterfeit goods is a scourge that is growing to epidemic proportions (up by an estimated 20% every year) across the wider Europe in both the range and volume of goods involved. All member states of the Council of Europe are concerned either as countries of origin ('producers'), transit or end-destination for counterfeit goods. This multi-billion euro problem can no longer be ignored as marginal owing to the extent to which it undermines security, economic growth, employment, innovation, investment, competition, tax income and the reputation of brand names.

4. Given the rapidly deteriorating situation throughout Europe, your Rapporteur and other members of the Assembly presented a motion for a recommendation (Doc. 10946) pointing to the need for a Council of Europe convention on the suppression of counterfeiting and trafficking in counterfeit goods. They also urged action "to increase awareness of the dangers that counterfeiting represents to the safety and security of all European citizens" and to shape a coherent European policy for preventing, deterring and curbing counterfeiting. This report will therefore illustrate the extent of the counterfeiting problem in Europe and propose practical measures for a counterattack by the Council of Europe member states. It is also meant to be complementary to, but much broader in scope than, a report on the quality of medicines in Europe prepared by Mr Bernard Marquet on behalf of the Assembly's Social, Health and Family Affairs Committee.

II. Counterfeiting: an unprecedented threat to Europe

5. The global parallel economy for counterfeit goods is huge and growing. It has kept pace, over recent decades, with economic and political developments, such as the advent of the information society and the Internet, the spread of trade liberalisation and outsourcing practices, and the availability of sophisticated modern technologies. In Europe, most barriers to trade in goods have fallen whilst a correspondingly frontier-free European judicial area still needs to be established. European countries are now confronted with a double challenge: the increasing quantity and variety of fakes from third countries¹ coming into Europe across its external borders and via the Internet, but also large quantities of counterfeits are 'made in Europe' for domestic use.

6. As the real extent of counterfeiting is by definition nearly impossible to measure, most expert estimates rely on statistics as to the number of counterfeit items seized and the number of cases registered, thus reflecting only a fraction of all fake goods in circulation. Pending the findings and

¹ OECD data shows that 80% of counterfeit seizures originate from only ten countries: China (32%), Thailand (13%), Korea (9%), Hong Kong of China (8%), Chinese Taiwan (4%), then Turkey, Malaysia, Vietnam, Philippines and Pakistan.

recommendations of the OECD project on counterfeiting and piracy, especially as regards a methodological framework for measuring the phenomenon and assessing its multiple effects, your Rapporteur will endeavour to illustrate the problem of counterfeiting with figures available at the time of writing from the European Union (EU), the World Customs Organisation (WCO), the World Health Organisation (WHO), the World Intellectual Property Organisation (WIPO), the World Trade Organisation (WTO), Interpol and Europol, as well as relevant NGOs and professional associations. He will first review the three major threats counterfeiting poses to Europe, that is, risks to public health, safety and the economy.

i. Consumer health and safety in danger

7. Most people assume that the products most copied are luxury or high-added-value articles. This was true in the 1980s when 70% of firms affected were in the luxury sector² but this cliché has long since ceased to apply. Today, via foodstuffs and drinks, medicines (both branded and generic drugs), cosmetics³, tobacco, electrical appliances⁴ or car parts⁵, the counterfeiters penetrate all households and economic sectors, disregarding quality and ignoring basic rules of safety and hygiene. These products when counterfeited are a serious threat to consumers. They accounted for about 57% of counterfeits seized by EU customs in 2005.

8. Although all consumer commodities can now be copied, the increase in seizures of children's games and toys⁶ (1287 cases accounting for 20 million articles in the EU in 2004-2005, foodstuffs⁷ (4.4 million items for 2004 and 5.3 million items for 2005 in the EU), electrical equipment (7.5 million items for 2004-2005 in the EU) and medicines (560,598 items for 2005 in the EU) is particularly alarming in terms of consumer health and safety. The trend observed in recent years, with a relatively strong increase in the counterfeiting of mass consumption goods, was thus confirmed in 2004 and 2005.

9. Deaths and injuries directly attributable to the consumption of counterfeit products are hard to quantify⁸, but the risks are clear for pharmaceuticals, agri-foodstuffs, toys, electrical appliances and car parts. Whereas developing countries, where regulatory structures are weaker and oversight is difficult, are the most affected by such counterfeits, European countries are increasingly vulnerable, in particular as sales of counterfeits via Internet are increasingly bypassing regulation and supervision by the competent authorities⁹. The EU has also acknowledged a problem of so-called trans-shipments whereby counterfeits enter Europe via seemingly 'clean' states like Japan and the US, or transit via EU member

² Nearly 8% of the counterfeit articles seized in 2004 were copies of European luxury textile and fashion accessory brands.

³ As a result of consumer interest in beauty products and luxury items, perfumes and cosmetics have always been widely copied. In this sector, counterfeiters usually focus on packaging, but also on content, substituting cheap, poor quality extracts for authentic ones. People who use fake perfumes or cosmetics are seriously at risk from allergies, since these products undergo none of the regulation tests or inspections.

⁴ 56% of French electrical appliance manufacturers are targeted by counterfeiters. These counterfeit appliances are a serious danger to property (fires) and persons (electrocution).

⁵ Up to 10% of the car parts sold in some EU countries are thought to be counterfeit.

⁶ Toys: loss of earnings due to counterfeiting is estimated at approximately 5 to 7% of the sector's turnover (source: UNIFAB).

⁷ The agri-foodstuff sector saw a marked increase in the counterfeiting of mineral water, milk products, freezer products, wines and spirits.

⁸ The WHO has some figures for contaminated medicines and alcohol. It attributes some 200 000 deaths per year to malaria as a result of consuming fake, ineffective, medicines. Thousands of Russians are poisoned and die each year from drinking fake vodka. The state-controlled Shenzhen Evening News has reported that 192,000 people died in China as a result of fake drugs in 2001. Dozens of babies in China are reported to have died after being fed fake milk formula.

⁹ An EU survey of member states found 170 counterfeit medicines in distribution channels, mostly through the Internet, over the past 5 years.

states to reach developing countries¹⁰. OECD studies show that counterfeits are increasingly infiltrating the legitimate supply chains and retail outlets.

10. The Council of Europe views counterfeit medicines as a special concern constituting a violation of the human right to the highest possible standard of health and, in extreme cases, of the right to life. It has raised awareness of the risks of counterfeit medicines in Europe and underpinned cross-sector communication on the subject. Its conference “Europe against counterfeit medicines”, held in Moscow on 23-24 October 2006, noted that there was a worrying incidence of sub-standard or fake medicines in European countries¹¹ and recommended that, among other preventive and control measures, a convention on pharmaceutical crime be prepared. We should, in this context, recall that the current EU legislation mainly focuses on the intellectual property rights (IPR) aspect of counterfeiting, including (but not specifically targeting) pharmaceuticals under patent and excluding generic medicines. It thus essentially protects IPR owners rather than the public.

11. Not only fake medicines but also many other counterfeits can hurt the health and safety of consumers. Poor general quality, sub-standard components (such as carcinogenic, allergy-provoking, fragmenting, highly flammable materials, dyes, conservatives and additives) or deficient assembly (leading to malfunctioning, cuts, burns, electrocution, fires and even explosions) transform many counterfeit goods into time-bombs in the hands of end-users. In fact, significant risks to consumer health and safety largely offset gains from lower prices for counterfeits.

ii. Counterfeiting in the hands of international criminal networks

12. Counterfeiting has become a lucrative, low-risk way of laundering money, as drug-traffickers plough some of their profits into the mass production of counterfeit goods. Increasingly, factories in regions where industry is starting to take hold (China, Thailand, Turkey, Morocco) or in the former Soviet countries (particularly Russia) are using state-of-the-art technology to manufacture fakes. In the same way, international organisations specialising in fraud have industrial facilities which allow them to produce or commission fake items on a commercial scale. Instead of spending all their time on replicas of well-known makes, which invite inspection, they are now turning out products which do not attract the authorities' attention. As a result, anything now goes on the fakes market, robbing firms of the fruit of their ideas and investment, and depriving states of tax revenue.

13. Just as the very nature of counterfeit and pirate goods has changed, so the techniques used to transport them across frontiers have evolved in recent years. In transporting fraudulent goods, the counterfeiters have largely adopted the methods used by drug traffickers. Today, for example, customs rarely intercept goods directly dispatched from the place where the fakes are produced to the place where they will eventually be sold. In fact, cargos of counterfeit or pirated goods can be shipped through several countries, and indeed continents, and use various means of transport before reaching their final destination.

14. Anti-counterfeiting specialists have a saying: what one man makes, another can copy, if he only has the resources to do it. Organised crime certainly has the resources. On the Balkan route alone, heroin traffickers net a monthly profit (actual profit, not turnover) in excess of 100 million euros¹². At least 10% of this is ploughed back into the counterfeiting industry. In fact, selling counterfeit goods is about three times more profitable – and three times safer – than conventional money-laundering and drug or human trafficking. Furthermore, Europol signals, amongst other criminal threats, that the number of

¹⁰ According to the WHO, up to 60-70% of certain categories of medicines in some developing countries, particularly in Africa and south-east Asia, are counterfeit. The market in fake medicines is estimated to amount to at least €27 billion annually.

¹¹ For instance, 93 cases in the Russian Federation, 39 in the UK, 28 in Ukraine and 25 in Germany in 2006.

¹² Source: Xavier Raufar, Director of Studies in the Department for Research on Contemporary Criminal Threats, University of Paris II – Panthéon-Assas.

counterfeit euros¹³ and other means of payment are increasing every year, entailing obvious risks to national security.

15. Moreover, there are proven links between certain counterfeiters and terrorist networks. The Secretary General of Interpol confirmed this as far back as 2003: "There is a well-established link between organised crime and the counterfeiting networks, and we are sounding the alarm, since offences against intellectual property are becoming the terrorists' favourite means of securing funds". On 26 June 2003, in its written Declaration on piracy and counterfeiting in an enlarged EU, the European Parliament expressed concern that "the organised crime networks behind the pirate trade use profits from piracy and counterfeiting to finance drug trafficking and terrorism". More recently, in January 2005, the Director General of French Customs declared that "the networks involved in trafficking are now just one element in mafia-style businesses which use drug and arms trafficking, tobacco smuggling and prostitution to serve ordinary criminal activity, but also, occasionally, fundamentalist causes, which find this convenient way of funding terrorism".

iii. The impact of transfrontier trade in counterfeit products on European economies

16. Too often, counterfeiting is perceived by society as a sort of victimless and harmless phenomenon, whereas for criminals it means a 'low risk, large profits' activity. No wonder counterfeits account for over 6% of global trade stretching perniciously into unexpected areas such as the cultural domain through the falsification of the works of art. European economies are inevitably and increasingly affected as counterfeit goods originate from, transit through or are delivered to European countries. Counterfeiting, as a rule, escapes taxation, product safety requirements and often costly investment in product development, thereby reducing states' revenue¹⁴ and the income of legitimate enterprises¹⁵, hurting fair competition (which is particularly disastrous for small companies), company reputation, jobs, investment and innovation, as well as draining resources from mainstream activities in both private and public sectors.

17. Industry and innovation are core elements in Europe's economy. Manufacturing accounts for 20-30% of the European countries' total output, about 75% of their exports and over 80% of private expenditure on research and development in the EU. The growth of productivity in that sector is nearly twice as high as that in the rest of the economy. Employing nearly 50 million people in the EU (25 countries) and just as many beyond the EU, industry also has knock-on effects on the service sector, which it uses extensively, and whose own development is fuelled by its innovations.

18. At a time when Europe, and more particularly the EU, is trying to give the Lisbon Agenda a fresh impetus, counterfeiting and piracy are increasing all the time, compromising European firms' efforts to break fresh ground and come up with new products: the European Commission's annual report on action taken against counterfeiting and piracy by Europe's customs services bears witness to the exponential growth of these activities. While EU customs authorities intercepted nearly 10 million counterfeit or pirate articles on the EU's external frontiers in 1998, the figures for 2005 are at close to 76 million articles, an increase of over 700%.

19. The expanding Internet, particularly auction sites, offer new ways of disposing of counterfeit items on a massive scale and anonymously. The Internet allows counterfeiters to hide, and indeed move if the

¹³ The November 2005 EU Organised Crime Report by Europol indicates that a total of 860,661 counterfeit euro banknotes worth over €45 million and 139,328 coins were seized during 2004 (an increase, respectively, of 27.7% and 130% over 2003). The largest numbers of fake euros have been discovered in France, Italy, Spain and Germany. Most good quality counterfeit euros are thought to be manufactured and disseminated by criminal groups of the Balkan and Baltic regions.

¹⁴ In Russia, for instance, an estimated US\$1 billion a year are lost in tax revenues (VAT, income tax and customs duties) not collected.

¹⁵ According to a study by the Centre for Economic Business Research in 2003, losses incurred by the European cosmetics industry due to counterfeiting amount to more than US\$3 billion annually. The World Customs Organisation estimated that counterfeiting cost European clothing and footwear companies about €7.5 billion a year and took about €3.8 billion a year from European software companies.

authorities trace them. Some sites openly advertise fakes, and counterfeit products (particularly medicines) are increasingly advertised on the Web. The International Narcotics Control Board (OICS) and the World Health Organisation are particularly alarmed at the proliferation of on-line pharmacies illegally supplying prescription drugs, including internationally-monitored substances and counterfeit medicines.

III. Initiatives to fight counterfeiting

i. At European level

20. When we consider the disastrous scale of the problem and look at the measures which the member states have taken to solve it, we may well wonder whether the European bodies appreciate its full seriousness. We may doubt it. It is urgently necessary that Europe, both within and outside the EU, should grasp the size of the problem and lose no time in devising a battle plan to tackle it.

21. The EU is undoubtedly becoming aware of the need for action. This is reflected in:

- **Initiatives**, including:

- "Operation FAKE", a joint customs operation targeting counterfeit goods imported into the EU, which ran from 17 to 25 May 2005;

- the use of TECS, EUROPOL's computer system, since 2005 to enter, access and analyse data, for the purpose of monitoring and grouping investigations;

- the support provided by EUROJUST, the European Union's judicial co-operation unit, which is responsible for combating all forms of crime, and works for better co-ordination and co-operation between judicial authorities in the member states;

- the research done by OLAF, the European Anti-Fraud Office, which makes it possible to review and improve the tactical objectives of investigations carried out by member states;

- the amended proposal for a Directive of the European Parliament and of the Council on criminal measures aimed at ensuring the enforcement of intellectual property rights (26.04.2006);

- the national measures taken by several member states to supplement and/or support the many anti-counterfeiting initiatives launched by European and other international institutions and agencies (transposition of EU directives, bilateral agreements, inter-institutional co-ordination, consciousness-raising campaigns for consumers, etc.).

- **Regulations**, including Customs Regulation No. 1383/2003, concerning customs action against goods suspected of infringing certain intellectual property rights, which has been in force since 1 July 2004. This regulation covers all intellectual property rights (IPRs), including plant varieties, designations of origin and geographical designations. The customs authorities are empowered to act as soon as they "have sufficient grounds for suspecting that goods infringe an intellectual property right". Applications for action are also free and harmonised.

- **Directives**, including Directive No. 2004/48 of 29 April 2004 on the enforcement of intellectual property rights which contains provisions on the harmonisation of national laws on measures, procedures and sanctions to ensure that IPRs, including patents, are respected. Harmonisation also applies to evidence, measures to preserve evidence, the right of information, provisional and protective measures, and calculation of damages due for injury inflicted by counterfeiting. However, the Parliament and Council disappointed hopes long cherished in some quarters by rejecting the Commission's original proposal for punitive damages of the kind which exist in American law – and which would have had a highly deterrent effect on counterfeiters.¹⁶

¹⁶ Cf. www.europa.eu.int.

22. In June 2003, the European Parliament adopted a written Declaration on piracy and counterfeiting in an enlarged EU. It called on the Council and Commission to provide strong, harmonised sanctions, promote better cross-border co-operation between the authorities concerned and strengthen the role of Europol. The Commission later proposed the adoption of a Directive of the European Parliament and of the Council on criminal measures aimed at ensuring the enforcement of intellectual property rights (26.04.2006).

23. In fact, most IPR violations are criminal offences in the member states, but penalties vary considerably and are often lenient¹⁷. Moreover, criminal law sometimes takes no adequate account of recent changes in patterns of counterfeiting and pirating, and particularly the growing involvement of organised criminal networks. At the same time, several important texts on co-operation between the police and the courts in EU member states, and on mutual recognition of criminal judgments, expressly state that they apply to counterfeiting and pirating (Europol, European arrest warrant, Framework Decision on execution in the European Union of orders freezing property or evidence, and Framework Decision on the application of the principle of mutual recognition to financial penalties). All of these initiatives are necessary, but they are inadequate, and indeed useless, unless they have a basis in criminal law at EU level. To allow the co-operation machinery to function satisfactorily, it is essential that criminal law in the member states should have a minimum joint approach to counterfeiting and piracy.

24. Directive 2004/48/EC of the European Parliament and of the Council on the enforcement of intellectual property rights said nothing on criminal penalties, but the European Commission adopted two proposals for texts of 12 July 2005 aiming at the introduction of an EU criminal-law response to IPR violations¹⁸. The proposed regulations treat any deliberate violation of an IPR on a commercial scale as a criminal offence. They provide for a range of penalties, applying both to individuals and to corporations: fines, confiscation of goods belonging to the convicted person, destruction of the disputed merchandise, and closure of the firm used to commit the offence. Concerning the severity of sanctions, the text provides, *inter alia*, that offences which are committed by criminal organisations, or endanger the health or safety of individuals, are to carry a maximum sentence of four years' imprisonment.

25. As in Directive 2004/48/EC, the term "intellectual property rights" covers all IPRs. Like Article 17, paragraph 2 of the Charter of Fundamental Rights of the European Union, which states that "intellectual property shall be protected", criminal-law protection applies horizontally. The text covers all IPR violations provided for in Community law (e.g. Directive 2004/48/EC) and in the law of member states. The Commission statement 2005/295/EC on Article 2 of Directive 2004/48/EC contains a list of these rights¹⁹, which include trade-mark rights, copyright, neighbouring rights, design rights, and patent rights. The text is to apply without prejudice to more stringent regulations provided for in the member states.

The Council of Europe

26. In April 2005, the Committee of Ministers took note of Recommendation 1673 (2004)²⁰ of the Parliamentary Assembly on counterfeiting, problems and solutions, which it brought to the attention of the governments of member states. In this connection, it made the point that, apart from its work on counterfeit medicines, the Council of Europe was doing little in this area. It sought and obtained opinions on this recommendation from the Committee of Experts on Pharmaceutical Questions (P-SP-PH), which responded via the Public Health Committee (CD-P-SP) and from the European Committee on Crime Problems (CDPC).

¹⁷ Towards European harmonisation? Lecture by Daniel Fontanaud – National expert seconded to DG JAI (EC) – Edition RIPIA – Union des Fabricants – No. 223 – 1st quarter 2006.

¹⁸ Proposal for a Directive and Proposal for a Framework Directive, merged in a single Proposal for a Directive on 26.04.2006 – Ref.: COM(2006) 168 final.

¹⁹ JO L 94 of 13.4.2005, p. 37.

²⁰ Text adopted by the Standing Committee, acting for the Parliamentary Assembly, on 7 September 2004 – Doc. 10069, Report of the Committee on Economic Affairs and Development, Rapporteur: Mr Schreiner.

27. As Rosmarie Zapfl-Helbling²¹ said at the Council of Europe's seminar on the counterfeiting of pharmaceutical products in September 2005, "the Parliamentary Assembly was happy to learn that the Council of Europe's Committee of Experts on Pharmaceutical Questions has already started work on a joint policy to combat counterfeiting". In summer 2004, that committee had actually published a document dealing with medicines on the Internet, in which it concluded that, although the Web carried a mass of information on the counterfeiting of pharmaceutical products, little of this information was "serious" or "measured". The facts were proved, but so much work was being done on the concept of counterfeiting that it was hard to quantify them. Was the debate about placebos, adulteration or the illegal sale of generics before primary preparations had entered the public domain? The Committee of Experts on Pharmaceutical Questions accordingly set up an "Ad Hoc Group on Counterfeit Medicines", one of whose practical initiatives was the organisation of the September 2005 seminar at the Council of Europe. This step prompted, particularly from several member states of the enlarged Community, a number of constructive proposals at the international conference organised in Rome by WHO from 16 to 18 February 2006²² and the Council of Europe's own work on preparing a European convention on pharmaceutical crime.

28. In the light of the Committee of Ministers' reply to Recommendation 1673 (2004), your Rapporteur decided that anti-counterfeiting measures could not be sectorised, since this might lead to discrepancies between initiatives taken against organised crime. Considering that the situation was deteriorating rapidly throughout Greater Europe, he accordingly requested that the Council of Europe take urgent, pragmatic action in all sectors to eradicate counterfeiting and trafficking in counterfeit products²³.

The European Patent Office

29. Intellectual property, and particularly patents, provide basic support for innovation and are an essential element in Europe's economy of knowledge. According to Alain Pompidou, President of the European Patent Office (EPO), the executive body of the European Patent Organisation, which grants patents having effects in Europe,²⁴ there are at least three reasons why Europe needs a strong patent system. Firstly, only patents provide the incentives and guarantees which innovators need to enter the market. Secondly, patents act as catalysts, since one innovation triggers others. They benefit, not just the innovator, but the whole community. In exchange for the rights which a patent confers on them, innovators are required to lay their new ideas before the public. In this way, patents play a major part in disseminating knowledge, and in keeping researchers and the community abreast of the latest technical developments. Finally, the patents system has an inherent value of its own, since it can go hand-in-hand with the development of commercial analyses and market studies. Investors in technology expect to secure patent rights, which can have considerable commercial value.

30. The European Patent Organisation has 30 years' experience, but changes are required in three areas. First of all, the high cost of taking out patents, which weighs particularly heavily on small and medium-size firms, needs to be lowered. If ratified by at least eight states including France, Germany and the United Kingdom, the London Agreement²⁵ would reduce certain costs, such as that of translation, substantially. Laurence Parisot, President of the French Employers' Organisation, the MEDEF²⁶, confirms that, "ratification of the London Agreement is a simple and sensible measure, which would allow French

²¹ Member of the Council of Europe's Parliamentary Assembly and former Chair of the Committee on Economic Affairs and Development.

²² Declaration of Rome of 18 February 2006 – International Conference «Combating counterfeit medicines: building effective international co-operation».

²³ Parliamentary Assembly of the Council of Europe – Doc.10946 of 31 May 2006.

²⁴ *Quel système de brevets pour l'Europe?* Alain Pompidou, pp. 26-27 in the magazine «Les dossiers européens – La contrefaçon et la piraterie en Europe».

²⁵ The London Agreement was concluded on 17 October 2000 between Denmark, France, Germany, Liechtenstein, Luxembourg, Monaco, the Netherlands, Sweden, Switzerland and the United Kingdom, with three aims: to reduce costs, to simplify procedures and reduce waiting periods, and to facilitate and generalise use of the European patent. Today, after five years of discussion, some signatory countries have still to ratify the Agreement, and are thus preventing the process for simplification and generalisation of the European patent from taking effect.

²⁶ MEDEF: Mouvement des Entreprises de France (Conseil national du patronat français).

firms to protect new products more simply. It would also allow the European patent to compete with the American and Japanese patents, which are three to five times cheaper today”.

31. Secondly, although the European Patent Convention gives Europe an excellent system for the centralised granting of patents, a centralised patent court is essential to settle disputes. Here again, standardised settlement procedures, like those which exist in the United States and Japan, would reduce legal costs and provide better legal protection, while also improving the climate for innovation in Europe. The European Patent Litigation Agreement (EPLA)²⁷ offers Europe a solution, and the time has now come to give it a single patent court.

32. Finally, patent culture needs to take a firmer hold in Europe, which clearly lags behind the US and Japan in the importance which it attaches to patents and their use. This is partly due to gaps in European law, but also to Europe’s lack of a strong patent culture – which is why it must endeavour to propagate an awareness and a general understanding of the patent system. As we have said, a solid patent culture is crucial.

33. In November 2003, the Working Party on Litigation, established by the member states of the European Patent Organisation adopted a declaration emphasising that the proposed jurisdictional arrangement offered an optimum solution for users of the European patent system, and the drafts constituted a suitable basis for convening a diplomatic conference to adopt a new court system. However, the declaration also acknowledged that the setting-up of a litigation system for European patents would have to be suspended, in view of the work being done by the European Union on the introduction of a Community patent with a judicial system of its own.

34. The EPO has played an active part in the work of the Working Party on Litigation, because of the urgent need to remedy the shortcomings of the present multinational litigation system, and solve the familiar problems which arise from multiple patent litigations, involving high costs, legal uncertainty, cross-border litigation and forum shopping. The prospect of the European Community’s setting up a patent system, with, among other things, a centralised court for Community patents, is no reason for inaction. In fact, several hundred thousand European patents are currently in force in EPC²⁸ contracting states, and the EPO will continue to grant European patents even when Community patents become available. This means that users of the European patents system already need, and will continue to need, a system to settle disputes concerning European patents. Your Rapporteur welcomes the close working relationship between the EPO and the PACE.

Action by customs services

35. Among the initiatives taken by European customs services in recent years, operation “FAKE” (a European scheme for joint inspection of imported counterfeit goods), which ran for ten days from 17 to 25 May 2005, provides a particularly good illustration of counterfeiting trends and of the work done by the authorities, particularly customs services operating in the field. It was launched by the European Commission at the request of several member states, although it covered all of them and involved cross-the-board mobilisation against counterfeiting. Another aim was to swing added weight behind the concept of a co-ordinated response. Action by isolated states is not enough, and joint operations like “FAKE” make it possible to send counterfeiters a united message and, above all, dismantle their networks.

²⁷ At the Paris Intergovernmental Conference on 25 June 1999, the EPO’s member states set up a Working party on Litigation, which has now proposed the main lines of the European Patent Litigation Agreement (EPLA).

²⁸ EPC (European Patent Convention): The twelfth edition of the Convention on the Grant of European Patents (version 1 January 2006) with its implementing regulations (version of 1 July 2005), of the Protocol on Centralisation of 5 October 1973, the Protocol on Recognition of 5 October 1973, the Protocol on Privileges and Immunities of 5 October 1973 and the Rules relating to fees (version of 1 April 2006). On 29.11.2000, the 2000 Diplomatic Conference (cf. OJ EPO 2001, special edition No.4) adopted numerous amendments to the EPC. Articles 16, 17, 18, 37, 38, 42 and 50 of the EPC and the Protocol on Centralisation, as amended, as well as the Protocol on the Staff Complement, apply provisionally and so take immediate effect. These new provisions were inserted in addition to the existing texts. The revised edition also contains a list of published decisions and opinions of the enlarged Court of Appeal (Annex I), a summary table of legal advice provided by the EPO (Annex II) and an alphabetical index.

36. Operation FAKE mobilised over 250 officials from various European customs services in most of the EU's international ports and airports. Co-operation between customs authorities in the 25 EU states was co-ordinated by the relevant EU Commission departments, the European Anti-Fraud Office (OLAF) and the DG TAXUD. The success rate in spotting consignments of counterfeit goods among normal imports was high. Specifically, the operation was directed by a team comprising some dozen liaison officers from member states and a number of Commission officials, who provided ongoing technical back-up for the customs activities conducted from OLAF's Brussels headquarters.

37. Finally, another aim was to put inter-state co-operation to the test, and pool information and working methods. Thus, the operation was based on prior research and precise targeting of origins and products. It was not a question of opening all containers and inspecting all products, but only those which customs thought most dubious. The soundness of their judgment was proved by the fact that 25% of the containers selected for inspection contained counterfeit products.

38. A sizeable majority of counterfeit items are manufactured in Asia, and so Operation FAKE focused on containers from the port of Ningbo and from Beijing and Shanghai airports. Since a broad range of channels are used, postal and express freight consignments were also inspected.

39. The success of this operation, which many European customs services²⁹ have confirmed, is both encouraging and disturbing. Encouraging, because the figures speak for themselves: 140 consignments sent by air and 60 containers sent by sea were seized or detained; 500 tonnes of counterfeit goods, i.e. 26 million articles, were intercepted. Disturbing for several reasons:

- many of the products seized were dangerous (cigarettes, batteries, light bulbs, medicines, electrical appliances, etc.);
- the operation required lengthy preparation and the large-scale involvement of customs services in the member states. Repeating it would pose problems, since certain customs teams cannot participate regularly in schemes of this complexity;
- the surprise effect of such operations is limited. Organised criminals will eventually learn to spot the preparations and evade the traps set for them.

40. Success depends on striking in the right places. Airports and ports are the main points of entry for counterfeit goods made outside Europe, and so most finds and seizures are made in these places. But how, for example, can the effectiveness of seizures be maximised in a port like Antwerp, which has only four specialised customs officers and receives 1,000 containers daily?

41. Community involvement is obviously necessary for large-scale deterrent operations. To be effective, customs services also need to co-operate more closely with their counterparts in other European countries. But these operations cannot become routine for customs officers, who need to anticipate controls by adopting harmonised methods of identifying transport papers before goods enter, and developing their ability to spot suspect containers and seize counterfeit products without consulting rights-holders.

42. The new powers conferred on customs services by the Community Regulation allow them to contact firms which are unaware, or have not been informed, that their products are being copied. They also allow them to impound suspect goods, even before the right-holder has formally asked them to take action. However, given that customs services have limited staff, that huge quantities of goods need inspecting and that the range of products is enormous, the experience of the customs authorities and the help provided by right-holders are still not enough. Hence the need for harmonised technical means of prevention and dissuasion, which can be used to authenticate, trace and check goods easily, at any time and in any place. Proving that goods are counterfeit is thus the vital element in routine checks.

²⁹ "Operation FAKE": lecture given by Philippe Kearney, Sub-Director in the Directorate General of Customs and Indirect Taxes (France) at UNIFAB's 11th European Intellectual Property Forum on 21-22 March 2006.

EUROPOL, the European Police Office

43. Europol's contribution to fighting crime in Europe is based on co-operation between European police forces and, more specifically, between liaison officers seconded to the Office by its member states. Its brief covers drugs, terrorism, international crime and paedophilia. But it has no executive powers, i.e. cannot arrest suspects. "Field work" thus remains a matter for national police and customs services. Europol's work is entirely focused on exchanging information and setting up a joint database, via the TECS³⁰ data processing system, which was launched on 1 January 2002. Simplified transmission of data needed for investigation purposes is thus Europol's main function. Essentially, therefore, it is a clearing house for information on crime in Europe, including industrial counterfeiting. It provides an ideal forum for the exchange of information between EU police forces, and for improved co-ordination of member states' initiatives, involving all those concerned in the public (customs, police) and private sectors.

EUROJUST, judicial co-ordination

44. EUROJUST was written into the EU Treaty by the Nice European Council in December 2000. It was formally established in February 2002 and started work in 2003 on promoting co-ordination between courts in EU states where parallel cases are being heard. This co-ordination applies when crimes affect at least two EU member states, or a member state and outside countries. Based in The Hague (Netherlands), where Europol also operates, Eurojust is concerned not only with individuals, but also with firms. It increases the effectiveness of investigations and prosecutions initiated by national judicial authorities, particularly in cybercrime cases. It works closely with Europol, and provides assistance for the investigation of cases of organised crime, on the basis of Europol analyses. It has "one national member seconded by each member state in accordance with its legal system, being a prosecutor, judge or peace officer of equivalent competence". It is, in other words, an operational co-operation unit responsible for combating all forms of crime. An EU body, it has the task of promoting and improving co-ordination and co-operation between judicial authorities in the member states. It may ask national prosecutors to initiate investigations or prosecutions, report offences to the relevant authorities in another member state, or participate in setting up joint investigation teams. Finally, Eurojust may also use the European arrest warrant to secure rapid extradition of criminals sought by EU member states.

OLAF, the European Anti-Fraud Office

45. OLAF essentially acts as a kind of "service platform" for its member states. It helps them to carry out strategic and operational analyses, thus enabling them to review and adjust their tactical objectives. It also promotes co-operation and provides practical support for investigations carried out by member states, chiefly when acting on their own proves difficult. The most striking practical example is the recent case of cigarette smuggling by the American manufacturers Philip Morris, RJ Reynolds and Japan Tobacco International. On the basis of OLAF's investigations, the European Commission and ten member states brought a civil action against them in the American courts for importing cigarettes illegally. Negotiations with Philip Morris International led to the signing of an anti-fraud and anti-counterfeiting agreement on 9 July 2004. This agreement also covered the payment of some 1.25 billion dollars to the Commission and the ten signatory states over a 12-year period. No member state could have taken this action on its own.

46. As well as acting within Europe, OLAF acts outside, to protect European interests upstream. In July 2006, for example, it stepped up mutual co-operation with the Jebel Ali Free Zone Authority (JAFZA)³¹ on combating fraud, counterfeiting and other trade abuses, and both sides intend to take this further. This is the first time that OLAF has initiated co-operation of this kind with the authorities in a duty

³⁰ TECS is Europol's computer system. The Europol Convention states that the Office is to set up and operate a computerised system which can be used to enter, access and analyse data. It lays down strict regulations to protect personal and data rights, and ensure monitoring and security of data. Since 2005, TECS has consisted of three main elements: an information system, an analysis system and an index system.

³¹ Authorities in the Jebel Ali duty free zone in Dubai.

free zone. The move strengthens the close co-operation which already exists with other partners in Dubai, particularly the Ministry of Economics and Trade and the customs authorities.

European countries: some faster, some slower

47. Several country studies on Council of Europe member states (see the appendix) illustrate national measures taken against counterfeiting. But are results on a par with the energy expended? The answer is no. All the signs are alarming. The worst is still to come - and yet Europe is finding it hard to mobilise and devise an appropriate response.

48. Economic players complain that the alarming growth in counterfeiting finds Europe insufficiently proactive. In reality, it is not a question of being proactive, but of matching the response to the danger. Undoubtedly, "customs Europe" is a model of harmonisation, and far ahead of "police Europe" and "judicial Europe", which have yet to move beyond co-operation.

49. In fact, effective action against counterfeiting still depends on states, on their transposition of EU directives, on their highly individual perception of the dangers, and on their real determination to act and co-operate. Putting it simply, an objective analysis of the situation shows that deterrence is inadequate, prevention is over-dependent on consensus, and enforcement lacks resources.

EU instruments: useful but minimalist

50. As described above, the European Union has set up Community machinery to combat counterfeiting. Its two main texts – a directive³² and a regulation³³ – are limited in their scope and have major shortcomings:

- they have no criminal content;
- they do not insist on the need for official seizure of counterfeit goods, even when right-holders take no action, and do not even provide for "French-style" customs seizure of goods bearing counterfeit trademarks, whether in circulation or impounded,
- while they significantly improve the situation regarding the powers of courts, the absence of criminal provisions reduces their scope.

51. This legal confusion obviously reflects discrepancies between countries, but it also reflects the Commission's difficulty in getting the DG Internal Market and Services, the DG Taxation and Customs Union, the DG Enterprise and Industry, and the DG Justice, Freedom and Security to present a united front.

52. This failure to co-ordinate – which organised crime exploits by focusing its counterfeiting activities on the weakest points in the system – is all the more regrettable for the fact that member states were supposed to transpose Directive 2004/48 of 29 April 2004 by 29 April 2006. That Directive requires member states to give "beneficiaries", i.e. right-holders, a legal right to request the taking of measures to preserve evidence of counterfeiting, receive information on the origin of counterfeit goods and the networks used to distribute them, seek interim injunctions to prevent IPR violations, and claim compensation for the damage they have suffered.

53. **Italy, Denmark, Romania and Hungary** have transposed the Directive. **Belgium, Finland, Ireland** and the **Czech Republic** are doing so, and other countries, e.g. **Sweden**, which are finding it hard to secure agreement on it, are falling far behind. The **United Kingdom** has still to publish a bill, but the British Government plans no major changes. In **France**, an inter-ministerial draft – the work of the Ministry of Industry (patents, trademarks, designs and semi-conductor typography), the Ministry of the Budget (harmonisation of customs procedures, exchange of information between law-enforcement

³² Directive No. 2004/48/EC, which is awaiting general transposition.

³³ Customs Regulation No. 1383/2003/EC Of 22 July 2003, which came into force on 1 July 2004.

agencies, extension of the powers of the DGCCRF and the TRACFIN Unit), the Ministry of Culture (copyright) and the Ministry of Justice (court proceedings) – is currently being studied.

ii. At international level

54. Global mobilisation against counterfeiting is a fact, but the action taken is still far too piecemeal. Counterfeiting remains endemic in all sectors of the economy and all parts of the world.

55. Many countries are acting on this problem, and promoting international co-operation to tackle it. Anti-counterfeiting associations are being set up in all the industrialised countries. In Europe, some firms join well-known associations like UNIFAB and become active within the Global Anti-Counterfeiting Group. In the USA, the International Anti-Counterfeiting Coalition (IACC) is the chief organisation representing the interests of firms affected by piracy and counterfeiting. It was the IACC which first denounced the links between counterfeiting and terrorism, in June 2003. Its white paper was supplemented in 2005 by the UNIFAB report on counterfeiting and organised crime.

56. In that white paper, the IACC urged the EU Commission and the US Congress to support Interpol's efforts for transfrontier co-ordination of action against international counterfeiting, trace counterfeiting networks, step up vigilance on frontiers, and insist that trading partners respect high IP protection standards.

57. The increasing efforts made by developing countries involved in the production and marketing of counterfeit goods must also be emphasised. China, for example, is gradually changing tack and subscribing to all the major international intellectual property conventions, including the TRIPS Agreement³⁴.

58. The fight against counterfeiting is thus worldwide. Apart from specific initiatives by associations and agencies, it relies on international instruments managed by a wide range of players. In practice, this diversity is making the global campaign increasingly vulnerable to organised crime, which is very well informed and exploits its enemies' failure to present a united front. We should note a highly pertinent call – contained in the declaration on 'Combating IPR piracy and counterfeiting' by the G8 Summit Meeting in St. Petersburg (July 2006) – "to enhance co-operation in that area among the G8 and other countries, as well as competent international organisations, notably the World Intellectual Property Organisation (WIPO), the World Trade Organisation (WTO), the World Customs Organisation, Interpol, the Organisation for Economic Co-operation and Development (OECD), and the Council of Europe".

WTO and the TRIPS Agreement

59. The technical co-operation programme for the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS) is designed to provide a clearer picture of that agreement's impact on development and strengthen the developing countries' capacity to analyse and negotiate, thus priming them for informed membership of IP associations, and enabling them to promote their sustainable development objectives effectively.

60. As Claude Mfuka wrote in 2002, "Recent research has shown that there is a correlation between a country's level of development and the level of protection it provides for IPRs. Thus, countries which have the technological capacity to innovate will attempt to strengthen the IPR system. Conversely, technologically backward countries will opt for a system which offers a low level of protection and so favours counterfeiters. In other words, developed and developing countries will adopt different positions on IPR. The development of IPRs in the pharmaceutical field, for example, clearly illustrates the effects of a country's development level on its choice of protection level."

³⁴ TRIPS: Trade-related Aspects of Intellectual Property Rights – a multilateral agreement signed within WTO in 1993, which came into force on 1 January 1995. It covers: copyright and related rights, trademarks, geographical indications, industrial designs, patents, layout designs of integrated circuits and undisclosed information.

61. Taking the example of pharmaceuticals, Mfuka continues, “various players are concerned with IPRs - developed countries and multinational firms on the one hand, and developing countries on the other. Their conflicting positions shaped the development of IPRs in the pharmaceutical field until the TRIPS Agreement was concluded. Implementation of that text is now leading to a clash of positions, which the problem of access to medicines in developing countries will aggravate. The players will have to adopt new strategies to ensure that the system develops in a way which serves their interests. The question of access to medicines for developing countries raises the problem of monitoring research-based patents and the permanent income derived from such monopolies³⁵ and these issues are now being thrashed out at the WTO.

62. WTO and the TRIPS Agreement are thus a decisive part of the international machinery for promotion and protection of IPRs, since WTO is the only international organisation to have something akin to a court, the Dispute Settlement Body. This “gives judgment” on complaints by member states, alleging that other member states are in breach of the WTO agreements, and authorises trade sanctions when these are appropriate. For more than 140 countries, this agreement, whose implementation is subject to verification by a court, provides the only legal basis for action against counterfeiting.

63. Nonetheless, the TRIPS Agreement is not perfect. As we all know, it was carefully and laboriously negotiated during the Uruguay Round at the request of the USA and the European Union - but it gives the developing countries a long period of grace before they have to act on it. As a result, its implementation is, at best, piecemeal. Similarly, because its provisions are flexible, many countries use different inspection methods – which makes international co-operation in this area exceptionally difficult.

WIPO

64. The World Intellectual Property Organisation (WIPO) is a United Nations agency based in Geneva. It was established in 1967 by the WIPO Convention, in which its member states gave it the task of promoting the effective use and protection of intellectual property world-wide, on the basis of inter-state co-operation and in consultation with other international organisations. It aims at devising a balanced and accessible international IP system, which rewards creativity, stimulates innovation and contributes to economic development, while protecting the general interest.

65. WIPO sees intellectual property as an important asset for the economic, social and cultural development of countries everywhere. Various strategic objectives are formulated in a medium-term plan published every three months, and detailed in a two-yearly document on the programme and budget. The five strategic goals defined in the programme and budget for 2006-2007 are as follows:

- to promote an IP culture;
- to integrate IP in national development policies and programmes;
- progressive development of international IP law;
- delivery of quality service in global IP protection systems;
- greater efficiency of management and administrative support processes within WIPO.

WIPO's principal tasks and programme activities all combine to help it achieve these goals.

66. Within this context, on 27 March 2006, after four years' work on revision of the 1994 Trademark Law Treaty (TLT), 147 WIPO states adopted by consensus the Singapore Treaty on the law of trademarks. The protection of trademarks depends to a large extent on their being registered. Although many countries recognise rights to unregistered trade marks, the best protection is provided by going through various formalities with a specialised authority, usually the Trademark Office of the country concerned. Trademark registration is also essential in the general interest, since registers are open to inspection and registration applications are regularly published, allowing anyone to establish that rights to

³⁵ Carroué, L. «Le sida ronge l'Afrique», *Alternative économique*, no. 178, February 2000, pp. 32-33, quoted in Mfuka, C., «Accord ADPIC et brevets pharmaceutiques», *Revue d'économie industrielle*, no. 99, Les Droits de la propriété intellectuelle: nouveaux domaines, nouveaux enjeux, 2002.

a certain trademark have already been assigned. The registers allow firms to monitor their own trademarks and those of their competitors, and verify that a new trademark is available before they employ it.

67. Since trademark rights are territorial (granted at national or regional level), they are administered, depending on the state concerned, via national or regional registers. For trademark holders, it is highly desirable that registration formalities should always be the same, since this makes for greater administrative efficiency and helps to contain transaction costs. These were the considerations which led to the conclusion of the TLT in 1994, the aim being to harmonise and simplify trademark registration procedures in all the signatory states.

68. The new Singapore treaty applies to all signs which can be registered as marks in the law of contracting states, but does not oblige the latter to register specific types of mark. It explicitly recognises that two-dimensional product labels are no longer the only trademarks, and the regulations on implementation expressly mention new types, e.g. hologram marks, motion marks, colour marks, and marks consisting of non-visible signs, such as sound or taste marks. For the time being, it includes no standard rules on representation of these marks in applications or registrations. Since they are mentioned, however, the assembly of the contracting parties can formulate such rules once the treaty has come into force, and agreement has been reached on their substance. These innovative marks arouse considerable interest, but are still comparatively rare. For example, the Madrid system's international register covers more than 450,000 marks - but only 29 of these are sound marks.

69. Apart from technical procedures of the kind redefined in the Singapore Treaty, WIPO has no binding legal means of combating counterfeiting. However, it runs major co-operation programmes for the developing countries, the aim being to help them to develop and modernise their national IP offices and bring their laws into line with the TRIPS Agreement.

WCO

70. Originally founded in 1952 as the "Customs Co-operation Council", the World Customs Organisation is an independent intergovernmental body. It aims to improve the effectiveness and efficiency of customs authorities – and is the only worldwide intergovernmental organisation in this field. The "WCO-IPR Strategic Group" is a joint venture launched with international business sponsors. It provides an overview of counterfeiting worldwide from a customs standpoint, and also a full range of services solely for its members and sponsors.

71. At its members' prompting, the WCO Council unanimously adopted a framework of standards to secure and facilitate global trade (SAFE) in June 2005. Globalisation and new requirements have brought changes in the tasks of customs authorities, and this instrument reflects the international customs community's determination to meet the challenges presented by the new international business environment.

72. Terrorist threats, the proliferation and diversification of fraud, and commercial pressures to facilitate trade while still protecting the logistics chain, have forced customs authorities to rethink their priorities from the ground up. The 21st century accordingly finds them breaking new ground as protagonists in economic development, governed by new regulations, performing new tasks, and using working methods and instruments which are changing all the time.

73. Michel Danet, Secretary General of WCO, was determined in 2005 to push ahead with the useful work already done on logistics chain security, for which 117 countries had undertaken to implement a "framework of standards". The problem of dealing with counterfeit and pirate products, and inspecting them on borders, merits the same approach. Indeed, Michel Danet sees this task as even more important. One of his ambitions is to devise, with the WCO Strategic Group, a full range of legal, procedural and risk-management solutions for the IP field. These solutions will need to be embodied in a programme or comprehensive framework, and explained to governments. This framework will become the

central element in the border protection strategy, and countries will all work in the same way, making bilateral and regional co-operation more practical and effective.

74. For the time being, the Secretary General is taking a cautious line. At the 5th international meeting on industrial property in Paris, he confirmed that there were still “too many non-law zones in the world” and that WTO’s IP agreements still lacked muscle. Moreover, anomalies still existed, even in the developed countries. His example was the Canadian customs service, which was not empowered to deal with counterfeit goods. He said that it was up to politicians to act urgently to solve a universal problem, and pointed out that the G8 had suggested, at its meeting in Gleneagles (Scotland) in June 2005, that improved co-operation between WIPO, WTO, Interpol, WCO and other relevant organisations might hold the key to effective action against piracy and counterfeiting.

75. Finally, WCO repeatedly insists that the current limitations of procedures for the seizure of fraudulent goods make it necessary for right-holders, who are the real experts on product authenticity, to work even more closely with the customs authorities.

ICPO - INTERPOL

76. The International Criminal Police Organisation (ICPO – Interpol) was established in 1923 to facilitate transfrontier co-operation between criminal police forces. It is the world’s largest international police organisation, and provides support and assistance for all services, organisations and authorities which have the task of preventing and combating international crime.

77. The Interpol Intellectual Property Crime Action Group (IIPCAG) was founded in co-operation with representatives of police services, customs authorities, intergovernmental organisations and private-sector associations to co-ordinate and improve international action on IP crime. The IIPCAG facilitates international police action against IP crime, publicises the economic and social effects of the trade in fake and pirated goods, runs training programmes for police officers working on IP offences, and improves co-ordination on IPR issues between police, customs and the private sector.

WHO

78. Depending on the countries concerned, counterfeit medicines account for 0.1% to 50% of the market, with one in two medicines sold via rogue websites (illegal Internet pharmacies) being fake. They are a serious threat to the most vulnerable of the poor countries, but also - and recently - to the richest countries, where elitist social security systems and the spread of generics are starting to cause problems. Only 5 to 15% of the 191 member states of the World Health Organisation (WHO) report cases of counterfeit medicines, and the real extent of the problem is still cloaked in ignorance, confusion and denial³⁶.

79. WHO is obviously involved in the fight against counterfeiting. For several years, it has been aware that help is urgently needed in countries which cannot regulate or monitor pharmaceuticals properly. It recommends supplying key medicines at low cost to discourage counterfeiters, introducing stiffer penalties, and making it a legal requirement to report cases of counterfeiting to the national authorities and to itself.

80. On 18 February 2006, at the Rome International Conference on Combating Counterfeit Medicines, WHO adopted a declaration which can play a vital part in strengthening global co-operation and in the finding of creative solutions.³⁷ In November 2006, the WHO officially launched a global task force IMPACT (the International Medical Products Anti-Counterfeiting Taskforce) involving more than 20

³⁶ Comments by Paul Newton, specialist in tropical medicine.

³⁷ The Rome conference was hosted by the Italian Pharmaceutical Agency and Italian Co-operation, and organised with the support of the International Federation of Pharmaceutical Manufacturers’ Associations (IFPMA). It was attended by experts from national governments and regulatory authorities, industry, intergovernmental organisations, and consumer and patient groups.

international partners. Its brief covers policy proposals and recommendations on legislation and enforcement, trade, risk communications and innovative technological solutions, including public-private initiatives for the application of new technologies to the detection of counterfeits, and technology transfer to developing countries. The Council of Europe is a member of the steering body for IMPACT and contributes to its work programme.

81. Laudable and necessary as this initiative is, there is reason to fear that it may sectorise action against counterfeiting. Like PSI, a private investigating body funded by the American pharmaceutical industry, the WHO structure may be too specialised, compartmentalised and professionalised. Unless it is open to parallel initiatives in other fields affected by counterfeiting, the new body may make it impossible to gain a clear picture of international trafficking, and make links between various types of crime - which is essential to dismantling networks and also to consistency of the tracing techniques used against counterfeiters.

82. Moreover, counterfeit medicines are not the only threat to consumer health and safety. Agri-foodstuffs, toys, car parts, avionics, wines and spirits, and electrical appliances are quite as dangerous, and the same precautionary principles must be applied to them. Measures taken to combat counterfeiting in the pharmaceutical and other sensitive sectors must be co-ordinated, and the specialised tracing techniques advocated at the Rome conference are at odds with the need for cohesion emphasised by WCO.

The International Chamber of Commerce (ICC)

83. The International Chamber of Commerce (ICC) represents businesses of all sizes in all sectors of the economy, and its network of 90 national committees gives it a worldwide presence. It is best known for its Court of Arbitration, the positions it adopts on major economic issues, the World Chambers Federation and its regular world congresses, and its London-based commercial crime services.

84. Many initiatives, both unisectoral and multisectoral, have been taken by businesses, and national or international agencies, to combat piracy and counterfeiting. Nonetheless, both have continued to expand rapidly. At the Marrakech Congress in 2004, several members of the ICC suggested that it should become active in protecting IPRs. The BASCAP³⁸ project was the result. It sets out to influence public and government opinion with the help of five tools:

- an Internet site which companies and professional bodies can use to pool their expertise and experience, and exchange best practices;
- objective figures showing the harmful consequences of piracy and counterfeiting;
- anecdotes and stories giving practical examples and bringing the problems to life. The public and the media are the target here;
- "indexes" of good national legislative and judicial practices;
- a media communication instrument, which regularly adjusts the ICC's messages in the light of current developments.

85. BASCAP is currently being implemented. The ICC is aware that bringing influence to bear on public opinion and governments is a major task, and will certainly take several years.

America's STOP initiative and the EU-US joint Action Strategy

86. In response to the growing dangers of counterfeiting, the US Government announced, in October 2004, that it was launching the Strategy Targeting Organized Piracy (STOP) initiative, to co-ordinate the work of various federal agencies, and called on other countries to promote the international co-operation needed to solve the problem. In recent months, President Bush has confirmed that combating piracy remains a US priority.

³⁸ Business Action to Stop Counterfeiting and Piracy.

87. The STOP initiative also reminds global businesses of the need to ensure that counterfeit goods, which undermine long-term investment and growth, are banned from commercial circuits³⁹ and advocates that IP protection is undoubtedly good for the economy. According to the 2004 report on the copyright industries in the US economy, the IP sector accounts for 12% of GDP, or US\$ 626 billion, and employs 8.41% of America's workforce, or 11.4 million people.

88. In fact, the dangers of fraud are as spectacular and omnipresent as the benefits of innovation. The growth in international trafficking in counterfeit goods calls for a united and uncompromising response. This is why the US has repeatedly insisted that it wants to work with other countries on dismantling the criminal networks which manufacture and distribute fakes.

89. This is also the reason why, at the EU-US summit in Vienna on 20 June 2006, Carlos Gutierrez, the US Secretary of Commerce, Günter Verheugen, the Vice-President of the European Commission in Charge of Enterprise and Industry, and Peter Mandelson, the European Commissioner for Trade, launched a joint EU-US action programme to combat IP piracy at world level. The new joint strategy involves considerable stepping-up of global action against counterfeiting and IP theft. The programme is the first of its kind jointly launched by the EU and the US to enforce the law.

90. Günter Verheugen declared on that occasion that "Our industry cannot compete successfully on the world market with knock-down prices and low-quality goods. The only path it can follow is the path of innovation, invention and quality. However, when ideas, trademarks or products are stolen, pirated and counterfeited, that approach is doomed to fail. That is why the EU and the US have joined forces to combat product piracy more effectively."

91. Peter Mandelson, the European Commissioner for Trade, added: "Protecting intellectual property is vital to the ability of the EU and the US to compete successfully within the world economy, since our high-added-value products have considerable intellectual content. Stepping up action to ensure that intellectual property is respected requires a joint strategy with teeth."

92. The main proposals agreed by the EU and the US include:

- closer customs co-operation, including coercive action on borders, jointly taken by EU and US customs officials for the purpose of combating intellectual piracy;
- joint measures to ensure compliance with the law in outside countries, including the setting-up, in embassies in those countries, of teams of European and American diplomats specifically responsible for exchanging data and information, and for joint surveillance tasks;
- greatly increased co-operation with the private sector, which is solidly in favour of improved IP protection, itself the key to the EU's being competitive.

93. The first efforts will focus on co-operation with China and Russia, but the EU and the US also have major interests in Asia, Latin America and the Middle East. The programme's aim is to help emerging markets to intensify their own efforts to stop IP theft.

China's progress

94. Meeting at the second EU-China Joint Customs Co-operation Committee on 19 September 2006, László Kovács, the European Taxation and Customs Commissioner, and Mu Xinsheng, the Chinese Customs Minister, agreed on a pilot scheme to secure and facilitate commercial exchanges between China and the EU. At the same time, Markos Kyprianou, the European Health and Consumer Protection Commissioner, and Li Changjiang, the Chinese Minister in charge of Quality Supervision, Inspection and Quarantine, signed a "safer toys road map", aimed at ensuring that toys imported to the EU are safe. They also signed an agreement on fighting the trade in illegal food products, based on an improved

³⁹ Comments made in June 2005 by William Lash, US Assistant Secretary of Commerce for Market Access and Compliance.

exchange of information and enhanced co-ordination. Furthermore, a joint seminar was held to discuss ways of improving the enforcement of safety legislation for industrial products.

95. These agreements are intended to pave the way for stronger trade relations between the EU and China. In autumn 2006 the Trade Commissioner, Peter Mandelson, presented a “communication on a strategy for EU trade and economic relations with China” also tackling the trade barriers which currently prevent European businesses from accessing the Chinese market.

96. The following are the main issues: counterfeiting and piracy, product safety and trade in illegal foodstuffs. According to the Business Confidence Survey carried out by the EU Chamber of Commerce in China in 2006, the low level of IPR protection is still one of the key problems of doing business in China. In fact, only 9% of the respondents had never had IPR protection problems in China, and 67% said that China’s current enforcement of IP laws and regulations was not an effective deterrent. This is a cross-sectoral problem, and causes huge losses for sectors as varied as agro-chemicals, textiles, and the car and pharmaceutical industries.

97. The pilot scheme aims to deal with the problem by creating “smart and secure trade lanes” between China and the EU, based on more controls throughout the supply chain, improved information flows, and the use of screening technologies and security standards. For the time being, the project will be limited to exchanges between the ports of Rotterdam (Netherlands), Felixstowe (United Kingdom) and Shenzhen (China) and will focus on containers. If successful, however, it could gradually be extended across the EU.

98. As regards product safety, according to the RAPEX (rapid alert system for non-food consumer products) report for 2005, half of all the unsafe products reported came from China – hence the urgent need for action to stop dangerous products from entering Europe. The European Commission is particularly targeting toys, since 25% of RAPEX notifications concern toys – 85% of them from China. The road map’s main purpose is to improve the safety of Chinese toys exported to the EU, with the help of training and technical assistance, the exchange of RAPEX data between EU and Chinese authorities, and the setting-up of tracing and follow-up machinery for dangerous products.

99. As for the trade in illegal foodstuffs, there are no official health and quality checks on foodstuffs illegally exported to the EU from China, which are a potential threat to animal and human health. According to Philip Tod, the Commission’s Health and Consumer Protection Spokesman, the EU’s rapid alert system was notified of six cases of illegal poultry exports from China in 2006 – at a time when the bird flu outbreak was at its height. Moreover, in early September, NGOs found traces of illegal genetically modified rice from China in products on sale in Asian stores in Germany, France and the UK. The co-operation agreement recently signed by the EU and China is designed to deter and prevent illegal imports and exports of foodstuffs by improving information exchange, conducting joint investigations and introducing electronic certification.

100. The positions seem to be clear. For László Kovács, the European Taxation and Customs Commissioner, combating IPR violations is the main purpose of customs co-operation with China. “The statistics show that more than 50% of the fake products seized – including foodstuffs and pharmaceuticals, which are a threat to the safety, health and even lives of our citizens – come from China. So we wanted to involve China in this joint struggle, and they showed a great deal of co-operation and we were very pleased with that”, he said.

101. Markos Kyprianou, the European Health and Consumer Protection Commissioner, said: “Nearly half of the dangerous consumer products detected in the EU, especially toys, are imported from China. This has to change. The agreement we have signed today with the Chinese authorities is a significant step forward in ensuring consumer safety. Enhanced co-operation with the Chinese authorities in the field of food safety should also help to protect consumers and foster progress in trade talks.”

102. Mu Xinsheng, the Chinese Customs Minister, noted that “The Chinese Government pays great attention to IPR protection, and has made good progress in the fight against IPR infringements”. He expected that the pilot project for smart and secure trade lanes would strengthen the action taken against smuggling, counterfeiting and terrorism, and hoped that the import and export of counterfeit goods from China could largely be stopped.

IV. Ineffective deterrence

103. Only a stable criminal society can sustain an illegal market, such as the market in counterfeit goods. And only a powerful (i.e. respected) criminal entity can sustain illegal trafficking. This is why large-scale or ongoing trafficking in counterfeit goods must be regarded as being under criminal influence. This being so, Europe’s efforts must be aimed, not only at the people who make the fake products, but at the criminals who plough dirty money into the fakes industry, ignore basic principles of hygiene and quality, use drug-trafficking networks to distribute fake items, and intimidate, corrupt, bully - and kill when they have to.

104. Counterfeiting is no longer a minor offence. It is true that, at the Brussels European Council on 20-21 March 2003, the EU heads of state and government called on the Commission and member states “to improve exploitation of intellectual property rights by taking forward measures against counterfeiting and piracy” – but this commitment has yet to find expression in European anti-counterfeiting regulations. Similarly, when the G8 discussed action against piracy and counterfeiting in Saint Petersburg on 16 July 2006 – three years after that European statement of good intentions – the heads of state unanimously declared that the action taken against organised crime must be made more effective. Nonetheless, the project for harmonisation of criminal law on intellectual property (IP) offences, proposed by the EU on 26 April 2006, has yet to be implemented.

105. Directive 2004/48/EC, which was adopted on 29 April 2004 and is intended to make action against counterfeiting more effective by harmonising national law, deals with measures for preserving evidence, the right of information, provisional and precautionary measures, measures applying to disputed goods, and compensation. In other words, it focuses essentially on civil-law issues and on compensation for right-holders, but says absolutely nothing about criminal-law provisions, to which many member states objected when the Directive was being negotiated at the draft stage.

106. The fact is the Community has completely failed to act on the one thing – criminal-law provisions matching current criminal profiles – on which deterrence needs to focus today. This absence of legislation stops Europe from combating counterfeiting effectively, and does much to foster that explosive growth in trafficking which all the police authorities report.

V. Prevention too dependent on consensus

107. Europeans are still blind to the scale of counterfeiting and to its long-term effects on their daily lives. On average, 30% of French, German, British, Spanish and Italian consumers openly admit to buying counterfeit products⁴⁰. This is why several countries feel that national consensus on counterfeiting is needed in each member state, and that this must centre on two things: moving on from the (fairly widespread) idea that counterfeiting essentially harms manufacturers to the idea that it also harms the community and, above all, individuals; and adopting a consumer standpoint.

108. This consensus on action against counterfeiting must go beyond questions of economic survival, and reinforcement of the punitive arsenal, and actually mobilise people in Europe. A powerful and convincing consciousness-raising campaign is needed to bring them onside.

⁴⁰ Ipsos survey, May 2006. Although 62% of those surveyed say that they have never bought counterfeit products, 23% of those would be willing to do so if given the opportunity. Among those who admit to buying counterfeit products, Spain takes the lead with 46%, followed by Germany (41%), Italy (36%), the United Kingdom (35%) and France (30%).

109. In 2006, France⁴¹, Italy and Spain launched such campaigns, all with the same objective: to make consumers aware of their responsibilities, i.e.

- highlight the disastrous consequences of counterfeiting and digital piracy,
- show the “negative benefits” of counterfeiting, but without moralising or trying to make people feel guilty,
- avoid direct emphasis on criminal sanctions,
- cover all aspects of the problem and, on the same level, its consequences for the community and individuals.

110. From December 2005 to March 2006, the Spanish Ministry of Culture ran a national anti-piracy campaign, centred on the message that copyright protects not only authors, composers and other right-holders, but also the community's cultural infrastructure. It focused on all the sectors concerned, including the film, music and visual arts industries, literature and software. Essentially aimed at the young, it used TV, radio, the youth press, the Web, exhibitions, theatres and public transport to put its message across. A large number of private copyright agencies joined in, distributing printed publicity material and using the logo “*Defiende tu cultura*” on their websites or products. The campaign was one of the activities covered by the anti-piracy plan approved by the Government on 8 April 2005, and other media initiatives, aimed at ensuring that copyright is respected, will follow.

111. Generally, consumers are clear as to the dangers and effects of the increase in counterfeiting. Indeed, a survey of consumer attitudes to fake or pirate products in Britain showed that 42% of those who had seen the latest information campaigns had changed their minds on fake products⁴². Pious wishes are one thing, but we may still wonder just how effective these campaigns - often too short and insufficiently attuned to the concerns of bargain-hunting consumers - really are.

112. The May 2006 Ipsos survey shows that the threat of severe punishment is the argument which carries most weight with consumers. The threat of imprisonment, for example, would make 69% think twice. A large majority (64% in both cases) speak of safety-risks to themselves, and of links with organised crime. Economic and social aspects are, however, less effective: the appeal to civic sense remains abstract. In other words, incremental and sporadic initiatives have little effect on consumers - particularly young consumers, who are increasingly interested in name brands, and increasingly disinclined to pay the full price for them.

113. Preventive efforts must be unremitting, long-term and connect with the daily lives of individuals. In this context, protected products must themselves forestall imitators, while consumers must be shocked into compliance by unsparing images of the real harm that counterfeiting does – and finally convinced by appropriate criminal laws.

VI. Enforcement short of resources

114. The minimum harmonisation achieved in Customs Regulation No. 1383/2003/EC of 22 July 2003 and Directive 2004/48/EC of 29 April 2004 reflects the yawning procedural disparities between EU member states, particularly concerning seizures, and the use of court orders and provisional measures to stop counterfeiting. These two texts are intended to provide a basis for Community action against counterfeiting, but the Commission, which fathered them, lacks the administrative resources it needs to fight counterfeiting effectively – and this clearly limits their scope. Basically, they are the lowest common denominator, and have produced no effects in criminal law.

⁴¹ National campaign against counterfeiting, launched in 2006 by the Ministry of Economics, Finance and Industry in partnership with the National Anti-Counterfeiting Committee (CNAC) and the National Industrial Property Institute (INPI).

⁴² “*Fake Nation!*”: *une radiographie du consommateur britannique* – article in the magazine, *Contrefaçon riposte*, No. 10, January 2006.

115. If national practices tally only to a minimum degree, how can the problem of seizures be solved? If consultation of right-holders is not mandatory, how can any effective action be taken? If the involvement of organised crime is not proved, how can criminal convictions be secured? Two key examples to illustrate the real situation: the “working customs man paradigm”; and courts and evidence.

i. The “working customs man paradigm”

116. Essentially because time is short, customs services need to move fast. As a rule, only goods already impounded by customs are seized, although some member states (e.g. France) allow immediate seizure when trademarks are involved. In other words, customs services rely on right-holders to confirm that goods are counterfeit.

117. The official procedure is as follows: when the customs service suspects that an article is counterfeit, it contacts the right-holder, who sends an expert to confirm – or not – that the item is a fake. Depending on the rights involved (trademarks, designs, copyright, patents, etc.), fake items are then impounded or seized by the customs service. It is then necessary to apply at once for a preventive attachment order or start proceedings (for counterfeiting), and give notice of this within a specified time (e.g. ten days for France) of the customs service’s impounding the articles in question. If customs seize the article, a direct summons must be issued or a complaint lodged more or less at once with a criminal court against the counterfeiter or the distributor. The right-holders can always sue for damages in criminal proceedings at a later stage if they have not done so already when the case is referred to the court.

118. The “working customs man paradigm” shows how unrealistic this procedure is in practice. The port of Antwerp, for example, receives a thousand containers every day. The few customs officers authorised to do so must examine the transport papers transferred by computer by the carrier, spot any anomalies, relate them to investigations already under way and, from dozens of suspect containers, select only a few for inspection, because they have neither the time nor the resources to search them thoroughly. And at night, when suspect items are found at the bottom of a container, and the right-holder cannot be contacted to provide the information needed to impound the goods, what are customs to do?

119. In this situation, one inevitably wonders how many illegal consignments slip through the net. “Most of them, probably”, the harassed customs men admit. The supervisory authorities (essentially customs and police) obviously lack the instruments they need to spot fakes quickly and reliably without contacting right-holders. This thorny problem should not be regarded as insoluble, even though the laborious and costly use of x-ray equipment on containers – suggested by several member states – will go only a very short way towards providing an answer.

ii. Courts and evidence

120. Once a case comes to court, the procedure outlined above should at least make it possible to show that the fake article in question has violated intellectual property rights (IPRs). This is a matter of establishing the existence of those rights and proving that a counterfeiting offence has been committed. Outside these specific parameters, and unless the right-holders take the right action, the courts cannot deploy their punitive arsenal effectively. Similarly, in proceedings for the seizure of suspected counterfeit goods, the courts need to be convinced. But to convince is not always to prove.

121. Investigating a product’s authenticity and origin, for the purpose of showing whether or not it is a fake, involves trying to establish whether it possesses the essential characteristics which show that an offence has been committed. The first step here is to ascertain what those characteristics are, and then verify, specifically and objectively, whether the product has them.

122. Today, we can see that the effects of all this on deployment of the punitive arsenal are considerable, since the latest case-law shows that merely procedural issues are obstructing the course of justice. In fact, the introduction of heavier penalties for counterfeiting has focused the debate on the production and processing of evidence. This protracts the proceedings, giving counterfeiters time to

vanish and regroup, and nullifying the investigations carried out by right-holders and supervisory authorities – wasting time and money in a way which both the latter are starting to find intolerable.

123. Moreover, IPRs are increasingly being contested, while ever more “perfect” copies are forcing right-holders - who want to show that theirs is the genuine article - to give more away and broadcast their trade secrets. This is a spiral which endangers firms, and from which only counterfeiters benefit.

VII. Conclusion: mixed results

124. It is only in the last few years that European states and the EU itself have turned their attention to combating counterfeiting, and they are now racing the clock in their efforts to defeat a destructive and terrifyingly large-scale phenomenon. But the strategic choices made by EU states are at odds with the consensus secured at international meetings. In fact, the Community regulations are essentially focused on civil proceedings, and particularly financial compensation for right-holders. Criminal-law aspects are completely overlooked, and means of deploying the punitive arsenal effectively and systematically are utterly lacking. Counterfeiting is still generally regarded as a minor offence.

125. The results obtained by the EU since 2005 are disappointing and by no means on a par with the real dangers – organised crime, industrialised counterfeiting, money laundering and the funding of terrorism. In fact, Europe is trying to hit the wrong target. Regrettably, the criminal dimension of the worldwide trade in counterfeit goods, including those aimed at the EU, seems almost totally forgotten in EU directives and regulations. This “memory lapse” is all the more surprising in view of the fact that individual states can do little against global crime and criminals, whereas the EU’s continental dimension is a pledge of successful action against organised crime – and specifically counterfeiting.

126. On 8 June 2005, Marc Laffineur, French MP and rapporteur of the National Assembly’s Delegation for the European Union, wrote: “The situation of the EU and its member states in respect of action against counterfeiting is marked by an undue gap between genuine awareness of the problem’s gravity and the need to do something about national practices which are divergent, if not actually tolerant, which make for haphazard action by courts and customs services, and which lead to Community law based on the lowest common denominator”. In the meantime, there has still been no action for adoption of powerful Community instruments to forestall, deter and punish counterfeiters.

127. One thing, however, is abundantly clear. All EU member states, and their neighbours, have the same crime problems or, putting it simply, the same “criminal foes”. Obvious, as we say - but the counterfeiting networks are still able to continue organising.

128. On 16 March 2006, the United States tackled the problem head-on by passing a law specifically designed to put a stop to the counterfeiting of manufactured goods⁴³. Among other things, this law closes a loophole by introducing criminal penalties for people who trade in counterfeit labels and packaging, intended for use on fake products. It also introduces heavier penalties for organised crime and the funding of terrorism from counterfeiting.

129. Consequently, and in view of the points made in this report, the Parliamentary Assembly should recommend, in addition to existing European measures, that the Committee of Ministers take resolute, concrete and pragmatic short-term action to eradicate counterfeiting and trafficking in counterfeit goods of all kinds, with a special emphasis on two priorities: genuine deterrence aimed at organised crime and uncompromising prevention.

⁴³ http://www.cbp.gov/xp/cgov/newsroom/highlights/counterfeiting_act.xml.

VIII. Recommendations

A European centre for statistical research on counterfeiting

130. Although counterfeiting is increasingly seen as a universal problem, little – strangely – has so far been done to take its “economic measure”. We only have police and customs figures for arrests and seizures (usually two years out of date), which reveal certain trends, but are not detailed enough to allow us to anticipate how the criminal markets will develop. Statistical research is hampered by the lack of harmonised definitions, clandestine nature of the phenomena, absence of reporting obligations and even some data protection mechanisms.

131. Measuring the economic impact of counterfeiting faces the same problems as any other attempt to estimate criminal activity. The exercise is further complicated by the fact that, to give a really accurate picture of the knock-on effects, it needs to take account, not just of production, trade, lost jobs and turnover, but also of the effects which IPR offences have on the image and reputation of right-holders, and of the impact of costly legal proceedings on their chances of recouping their investment in research.

132. This is why, in addition to the studies which OECD produces every five or six years, the authorities need quarterly figures, allowing them to adjust their sights and anticipate problems. Statistical monitoring of this kind can be carried out only by an independent authority representing all Council of Europe member states. This authority could do two things:

- illuminate the debate on action against counterfeiting by producing regular statistics, preparing studies and co-ordinating assessment of public and private anti-counterfeiting policies;
- illuminate the planning and implementation of anti-counterfeiting policies in all the entities and industries concerned, by producing forward analyses, and monitoring and assessing the results of policies applied.

133. Among other things, it should endeavour to supply analyses and statistics to public and private partners on request. The thrust of its work programme should be strongly influenced by national, European and international initiatives. This new context will make it necessary to adjust statistical systems and promote the introduction of appropriate assessment machinery, while catering for the needs of decentralised services. Its work programme should also reflect the need for more economic analysis and statistical monitoring of the national, European and international markets targeted by counterfeiters.

A technical deterrence policy

⇒ *Spotting fakes*

134. Investigating a product’s authenticity and origin, for the purpose of showing whether or not it is a fake, involves trying to establish whether it possesses the essential characteristics which show that an offence has been committed. The first step here is to ascertain what those characteristics are, and then verify, specifically and objectively, whether the product has them. For inspectors, authenticity is thus a relative concept, since it ultimately involves consulting a description of the product concerned. When a product’s authenticity is questioned, the first step is to determine the genuine article’s characteristics, and then see whether the suspect item actually has them. This operation is essentially technical, and the time it takes has a major bearing on the effectiveness of the procedure for seizure and investigation.

135. At present, there are two keys to establishing the authenticity of goods which are being sold wholesale or retail, or inspected by the authorities - experience and marking. Experience is the practised eye’s ability to compare products and tell them apart. However, fakes are getting better by the year – and this may undermine faith in experience. It is true that specialists, who spend years examining products of the same kind, acquire a huge amount of knowledge, a soundness of judgment and a sharpness of vision which often allow them to judge quality and origin far faster than others. But such experts are still few in number, and most of them are “generalists”, who check the vast majority of products submitted for

inspection. Laboratory checks are clearly required to determine the exact chemical composition of some categories of suspect goods, such as pharmaceuticals.

136. In the absence of staff with a highly-specialised knowledge of all the areas in which counterfeiters operate, targeted, straightforward checking would seem the logical answer. But this systematic approach has its dangers too: repetitive checking of visual marking systems may prove ineffective if technical checks are not carried out as well. In other words, the points we have made concerning experience apply here as well. In this situation, there is no such thing as “perfect” checking, until the evidence has been objectively processed and the findings are sufficiently useful in court.

⇒ *Producing evidence and its legal consequences*

137. Every dispute must be referred to a court, which is required to decide whether the article in question is genuine or not, and give judgment on that basis. Using the criminal courts to punish counterfeiters obviously means that the methods used to determine whether products are fakes must be utterly reliable. The police and customs are empowered to seize goods when the necessary time has been taken to check their authenticity, and an offence has been established.

138. When suspect goods are impounded by customs, the right-holder must take action, within a specified time, to establish that they are indeed counterfeit. When goods are impounded like this – a procedure distinct from that which applies when an offence has been established and customs have power to seize the goods in question – the public prosecutor, the applicant, and the person who filed the customs declaration or the owner of the goods are immediately notified. The applicant must use this time to apply to the president of the court to take protective measures, or enter himself as a party in civil or criminal proceedings, providing security to cover his liability if the goods are found to be genuine. If he fails to do this, they are automatically released on expiry of the time limit. In fact, impounding by customs is a provisional measure, and must be followed by judicial action.

139. At all events, these procedures are intended to permit production of proof that the goods are counterfeit and violate IPRs, which is a matter of establishing that these rights exist and that an IPR offence has been committed in this particular case. Outside these parameters, and unless the right-holders react effectively, the authorities cannot deploy their punitive arsenal.

140. On the other hand, when suspect goods are seized, it is usually necessary to convince the court. However, to convince is not always to prove. “Marking” is one of the technical devices used to forestall and deter counterfeiters by showing clearly whether goods are genuine or counterfeit. If they are satisfied that formal proof has been provided, the courts can take their decisions - on guilt, criminal or civil liability, sentence and compensation - more easily and, above all, more rapidly. Marking removes uncertainty, since this kind of evidence provides immediate, unequivocal proof of the facts, and the courts primarily rely on it in deciding on guilt and sentence.

141. Harmonised protection measures would do much to make action against IPR violations and deployment of an appropriate punitive arsenal effective. The technical means used in the IP field to identify goods and make them traceable (serial numbers), authenticate them (marking), seal them (breaking as proof) and so protect them against copying, manipulation or neutralisation thus need the kind of legal protection that already exists in the copyright field.

142. Setting up a European right-holders' association could also be considered. Based on a pooling of resources, this association would act for right-holders in deploying the technical resources needed to establish proof and activate the punitive arsenal and defend members' rights at both European and international level. Its membership would comprise individual right-holders, and professional federations or associations representing all or some of their members. It could become an operational body responsible for development, security and promotion of harmonised means of authenticating, tracing and monitoring goods worldwide to protect them against counterfeiting.

143. Among other things, such an association could formulate technical specifications for tenders invited from suppliers of anti-counterfeiting devices and service providers, advise its members on anti-counterfeiting solutions, co-ordinate practical measures to protect their interests with their own legal services, and represent them in dealings with regulatory authorities. It could also set up and operate a centralised database. Approved by a reliable outside body, this data-base would contain details of products registered to prevent counterfeiting, and allow customs, police and courts to determine whether specific articles have been registered.

⇒ *A new criminal arsenal*

144. To facilitate deployment of the punitive arsenal and take sufficiently deterrent action against organised crime, member states could set up a dedicated legal unit to work on the forging of trademarks. This would allow punitive action to focus directly on trademarks, and involvement of right-holders, required in current legal systems, would no longer be necessary. Nonetheless, the public prosecutor would notify right-holders that trademarked goods have been seized, thus allowing them to bring civil proceedings for violation of their IPRs.

⇒ *European regulations on harmonisation of protection measures*

145. European regulations will be needed, but will not be alternatives to national regulations or *de facto* standards developed by consortiums. The European Standards Committee (ESC) approach could be adopted, and a European standard (ES). Consensus on a European standard could take the form of a decision by the Committee's member countries on preparation of a standard.

A prevention policy

146. Information campaigns remain useful, if they are repeated and conducted in consultation with the right-holders concerned. Although an effective consciousness-raising policy is needed to make Europeans more aware of the problem, two things must be emphasised: deterrence and prevention. Any communication on counter-measures must be directly associated with products. Thus, products which are traceable and/or brand-marked should have a reassuring effect on consumers. Conversely, unprotected products should make them uneasy and prompt them to check. In other words, providing information on products is essential.

147. Messages on television, in the papers or on the web are revealing their limitations. They need to be supplemented by high-impact feature films, either documentary or fictional, putting over a lesson, making a point, revealing the true faces of counterfeiting (money laundering, drugs trafficking, terrorism, exploitation of children, etc.) and backed by topical treatment in the media. In this context, an audiovisual event devoted to the media (press, TV reports, documentaries, feature and fiction films) and attacking organised crime and counterfeiting could be mounted with the support of the European institutions.

Towards a criminal law convention on counterfeiting and trafficking in counterfeit goods

148. Your Rapporteur is convinced that, in addition to urgent practical measures outlined above, a pan-European legal instrument, such as a Council of Europe convention, is necessary for a truly comprehensive and cross-sector strategy to fight counterfeiting. Beyond the economic damage, the sheer scale and diversity of modern counterfeiting is a growing criminal threat to personal and collective security that calls for commensurate reaction of legislators in partnership with all stakeholders. While a legal instrument with a global reach would undoubtedly be desirable, this is hardly feasible within a reasonable timeline and given the high standard to which the European countries aspire. The Council of Europe, given its multidisciplinary approach, political and legal authority, as well as its pan-European membership, is ideally placed to galvanise and mobilise European states for tackling this complex challenge.

Appendix

Action taken against counterfeiting in some Council of Europe member states

On 5 October 2006, the European Commission published the findings of a survey of European companies⁴⁴, concerning their experience of IPR protection outside the EU in 2005. Having studied these findings, the Commission drew up a list of priority countries and regions, where resources must be concentrated and serious efforts made to combat counterfeiting. Apart from China, which is the EU's number-one priority in this area, Russia and Turkey count as high-risk countries.

The survey also shows that Russia and Turkey are highly active producers, exporters - and indeed consumers – of counterfeit goods. Both countries have promised the EU to respect its rules on IPR protection, but serious crime problems are involved, and solving them depends on their continuing to deploy substantial resources for that purpose.

By contrast, Romania has taken action which shows that a country, only recently regarded as one of the counterfeiters' havens, is fully capable of gradually restoring international confidence.

Russian Federation

The Federation of Russia – which is the largest and most populous of all the Council of Europe's member states, and has vast resources – has been engaged in continuous efforts to stabilise its economic and political system since the early 1990s. Its development drive has encountered numerous problems, and counterfeiting is one of the most intractable.

There is a huge market in counterfeit goods, both home-produced and imported (particularly from Asia), covering audiovisual items (CDs, software, films), agri-foodstuffs (this includes forging of geographical indications) and consumer goods (e.g. medicines, cosmetics, textiles).

In recent years, the Russian authorities have gradually come to see the utility of protecting IPRs. Driven by negotiations for WTO membership, this new awareness has led to significant improvements in legal protection of those rights. The authorities have also indicated that improving consumer protection and boosting investor confidence are among their aims in tackling the alarmingly high level of counterfeiting.

Russia is a member of the World Intellectual Property Organisation (WIPO). On 28 July 2005, ROSPATENT⁴⁵ signed a memorandum of understanding with WIPO, for the purpose of strengthening mutual support and co-operation between the two sides on questions relating to IPR enforcement. Aspects emphasised in the memorandum include effective laws, increased powers, the sharing and exchange of information, and wide-ranging efforts to promote awareness of the problem. A corresponding action programme has also been drawn up.

Russia is also party to the main international conventions on IP law, including the Paris Convention for the Protection of Industrial Property, the Madrid System for the International Registration of Marks, the Bern Convention for the Protection of Literary and Artistic Works, and the Rome Convention on the Protection of Copyright and Neighbouring Rights.

Recently, the Russian authorities have organised a number of major events, which have demonstrated their commitment to action against counterfeiting: the St Petersburg G8 and the Joint Declaration of 16 July 2006 on the fight against piracy and counterfeiting, and the conference, "Europe against counterfeit medicines", which was held in Moscow on 23-24 October 2006.

The passing of laws to protect IPRs is one aspect of Russia's gradually integrating within the structures of international trade, and is motivated in particular by the negotiations for Russian membership of the WTO,

⁴⁴ http://ec.europa.eu/comm/trade/index_en.htm

⁴⁵ ROSPATENT: intellectual property, patents and trademarks department of the Russian Federation

and by the EU-Russia Partnership and Co-operation Agreement (PCA), in which it undertook to harmonise its IP law with that of the EU.

Extent of counterfeiting in the intellectual field

One of the main obstacles to Russian membership of the WTO remains rampant piracy in the music, film and, above all, software sectors. Thus, at the end of 2005, the American Senate voted a resolution, hailed as "very important" by the Recording Industry Association of America (RIAA), aimed at compelling Russia to enforce copyright protection, particularly on the Internet, without delay. Counterfeiting in the intellectual field is certainly achieving alarming proportions. It is estimated, for example, that approximately 65% of the recorded music, 90% of the software and 75% of the films marketed in Russia are pirated⁴⁶. In 2005, the authorities demonstrated their determination to act effectively against piracy by launching "Operation Counterfeit" and "clearing" Moscow of numerous producers and sellers of counterfeit items in the space of two weeks. Russia has certainly passed wide-ranging anti-piracy laws in implementation of the international regulations, but it lacks enforcement agencies genuinely dedicated to combating the problem on the ground.

Vigorous as it was, "Operation Counterfeit" failed to satisfy the RIAA, although the local press reported that several pirate "factories" had been closed, and thousands of CDs seized, both there and on the streets. It is now up to Russia to show that producers and sellers of pirated goods can no longer trade freely on its territory.

Harmful effects of counterfeiting on the medicines market

Taking one specific sector, medicines - an important and rapidly growing part of the market - is also the target of mass counterfeiting. For over a year, the Russian medicines market has shown a 30-35% growth rate. But the manufacturers' glee is not shared by consumers: medicines are becoming more expensive, and counterfeit medicines - inevitably - are proliferating. Half of these medicines are home-produced, and the rest come from countries in the CIS (Commonwealth of Independent States), eastern Europe and south-east Asia. The medicines most affected are antibiotics, hormone-based products, blood substitutes and insulin.

Russia acknowledges the problem and plays a resolute part in international action to solve it. It is actively involved, for example, in the work of the World Health Organisation (WHO) and the Council of Europe in the field of counterfeit and sub-standard medicines. On the ground, a quality-control laboratory, co-funded by France and Russia, has been operating in Moscow since 2004, and is contributing to the detection of fake pharmaceuticals.

Geographical indications, alcohol and spirits

In October 2006, over 140 people became seriously ill in the Pskov region (northern Russia) as a result of drinking counterfeit alcohol. Reportedly, 15 died⁴⁷. Counterfeit alcohol poisoning is common in Russia. Between 11 September and 20 October 2006, the authorities recorded 125 cases of poisoning by contaminated alcohol in 29 residential zones in the Perm region, where seven of the victims were left in a critical condition. They had apparently consumed name-branded vodka containing detergents and other toxic chemicals. In Kamensk-Uralsky, a town in the Sverdlovsk region, three people reportedly died and 60 were hospitalised, between September and early October that same year, as a result of drinking ethanol sold in vodka bottles. The authorities responded by launching a massive series of inspections in the region's shops.

In December 2005, a Russian delegation visited France to discuss geographical indications with the relevant French authorities. The focus was on labels showing the origin of products, and one result of the

⁴⁶ Source: Moscow Economic Mission – Ministry of Economics, Finance and Industry – updated summary (original version, March 2003) – France (moscou@missioneco.org).

⁴⁷ Source: SSF Info.

talks was a scheme for clear labelling of Russian-produced commodities (e.g. cheese, butter and wine). Around the same time, a Russian customs service delegation held practical talks, involving firms and professional associations, with representatives of the French customs service. These visits were among the specific measures proposed by the Franco-Russian working party on action against counterfeiting.

Russia has engaged in similar consultations with many other European countries, reflecting its genuine determination to work with them against counterfeiting. The situation thus seems likely to improve - not only in the agri-foodstuffs sector, but in all those where IPRs are at issue.

Legislative protection of rights: significant improvement - but not enough

In the last few years, the Russian authorities have come to see the utility of protecting IPRs. Sparked by the negotiations for Russian membership of the WTO, this realisation has led to significant improvements in the legal protection of rights. For many years, "intellectual property" was merely a high-sounding phrase, but had no legal substance in Russia. People who ventured to claim IPRs were often written off as "liberals". Today, "intellectual property" is a generally accepted concept, although IPR protection is still not sufficiently effective.

As far as prevention and consciousness-raising are concerned, the media cannot be said to play an active part in combating counterfeiting. Essentially, their role is still limited to reporting court decisions ordering the seizure and destruction of counterfeit goods or giving counterfeiters suspended prison sentences. Few of those convicted are actually sent to prison, and victims are rarely compensated.

The laws on intellectual property certainly need to be improved but basically are effective. Enforcement thus appears to be the main problem. According to Andrei Minkov, a Moscow lawyer and IP specialist, the authorities, including the courts, do not seem to be making optimum use of the anti-counterfeiting laws. Russia's copyright laws, covering compensation of up to 170,000 US\$, have never really been enforced. As a result, financial penalties have had little effect on counterfeiters. Individuals or corporations whose rights have been violated are deterred from taking legal action by the fact that their costs are certain to exceed the compensation they are likely to receive. Only major companies with substantial resources can obtain satisfaction.

In the early years of the post-Soviet era, complaints that Russian judges were largely ignorant of IP law were often heard. Some are now better briefed, but their numbers are still too small. Judges' lack of expertise is one problem, but the projected Part IV of the Russian Civil Code also threatens to undermine IP protection. Under the bill, all the existing special laws, including those on copyright, trademarks and patents, would be repealed and replaced by Civil Code provisions, which would neither strengthen those laws nor remedy their shortcomings. Taking just one example, the projected code would give domain names the same protection as trademarks. This is contrary to international (including WIPO) practice, which uses the law on unfair competition to settle domain name disputes. Russian IP law experts claim that this new system would put Russia five years behind its present level of IP protection, which is already regarded as inadequate.

Turkey

Like all candidates for EU membership, Turkey must incorporate the full body of Community law, running to some 90,000 *Official Journal* pages, into its domestic law. Translating Community law is a problem in itself, but it also has to be compared in advance with Turkish law, which must itself be scrutinised. In the negotiations, it was agreed that Community law would - to facilitate this "screening" process - be divided into 35 thematic chapters: free movement of goods, agriculture, fisheries, taxation, environment, etc. The opening of negotiations on some of these chapters, e.g. free circulation of goods, is necessarily conditional on Turkey's implementing customs union effectively. Here, there are still several problems, intellectual and industrial property, and counterfeiting being two of the main ones.

Seizures of counterfeit goods clearly show that European manufacturers face a very real problem in Turkey: the victims include brand names like Vuitton and Lacoste, and manufacturers of electrical

equipment, household appliances or car parts (Legrand, Schneider, Tefal and Valeo). In its Regular Report on Turkey's Progress towards Accession, published on 10 October 2004, the European Commission notes that "Action to combat counterfeiting in Turkey is very costly, burdensome and lengthy for owners of rights [...]. Enforcement is further hampered by difficulties in obtaining search and seizure orders for counterfeited products from lower criminal courts and public prosecutors. [...] Training should be enhanced at all levels". The Commission concludes that: "Action against counterfeiting and piracy, strengthening administrative capacity, improving coordination and cooperation among enforcement and administrative bodies [...] should remain the priorities".

Similarly, in its latest report on Special Section 301⁴⁸, the US Government decided to keep Turkey on its list of "priority countries" for 2005, highlighting the concern caused, *inter alia*, by inadequate protection of medicines, non-protection of fertilizers, patent protection, piracy, trademark counterfeiting and effective enforcement of IPRs by Turkish courts.

Marc Laffineur, French MP and National Assembly Rapporteur in 2005 for EU action against counterfeiting, discussed these issues with the Turkish Ambassador in France, who felt that the whole problem was, to some extent, an inevitable part of the development process in an emergent country. He did emphasise, however, that Turkey realised that it was itself harmed by counterfeiting, which was "worth" some € 15 billion, and cost the treasury an estimated € 4 billion in lost taxes. Moreover, with a view to EU membership, Turkey is continuing to bring its laws into line with EU standards. For example, the new Criminal Code, which came into force on 1 April 2005, introduces stiffer penalties for counterfeiters: these include prison sentences of two to four years, and fines equivalent to 20,000 to 32,000 euros. A recent decree also makes activities which deprive the state of tax revenue criminal offences.

The fact remains that the attitude of the authorities (particularly customs and police) and courts does little to encourage companies anxious to defend their rights. For example, lawyers for *Lacoste*, the French manufacturer, point out that 85% of the sentences passed in this area were subsequently suspended. They also claim that they were never contacted by the Turkish customs. Adidas also reports that attacks on rights holders' lawyers are increasing, and that protection for parties during investigations and seizures is now essential. Finally, the International Intellectual Property Alliance's latest report on Turkey says that there were ultimately no convictions in two of the six copyright cases heard by first-instance courts in 2003, since the Supreme Court found that the plaintiffs had failed to show that the accused had manufactured pirate CDs. In the four others, the courts reduced the initial sentences by one-sixth, on grounds of the convicted persons' good behaviour, and this automatically meant that they could be suspended.

The European Commission recently published the findings of a survey of European firms concerning their experience of IPR protection outside the EU in 2005. On the basis of these findings, it drew up a list of priority countries and regions, where resources and efforts to combat counterfeiting should be concentrated. China, which is the source of two-thirds of the counterfeit goods seized in the EU, is the campaign's chief target. Next comes Turkey. While reserving the right to refer IPR violations to the WTO, the EU prefers to give these countries technical assistance and work with them in combating piracy. In other words, it is not in the business of drawing up black lists. The survey findings reflect its concern, and also its determination to tackle the problem. It is fully prepared to help Turkey to improve its system but is not prepared to accept continued, large-scale violations of EU companies' intellectual property rights.

Romania

By joining the EU on 1 January 2007, Romania becomes part of one of the world's greatest free markets – the EU internal market, where free movement of goods, workers, services and capital is an established right. In this context, the EU has looked closely at IPR violations in Romania, and at the Romanian authorities' response to them. The full monitoring report submitted by the EU Commission in 2005 states

⁴⁸ An agency responsible for securing progress on IP problems which are, in its view, harming US interests. It has three "black lists" for surveillance of countries thought to be involved in counterfeiting.

that the protection of intellectual and industrial property rights remains a major cause of concern⁴⁹ and that, although Romanian IP law is consistent with EU standards, enforcement is still raising serious problems, which must be tackled as a matter of high priority. However, a number of effective measures have already been taken, particularly concerning co-operation between institutions, co-operation on rights enforcement, and legislation.

Institutions concerned: measures to increase their capacity for action

Romania has two agencies specialising in IPR protection: the State Office for Inventions and Trademarks (OSIM) and the Romanian Copyright Office (ORDA). Their efforts are supplemented by those of several other agencies, e.g. the police, the prosecutors' departments and courts, the Ministry of Justice, etc. These entities have specialised staff who co-ordinate anti-counterfeiting measures within and between them.

Also significant are increased international co-operation and a number of beacon projects in this area, e.g. the 2005 project aimed at:

- strengthening institutions (by improving co-operation between them, reviewing the law, perfecting working methods, devising a means of assessing the piracy rate, and providing training);
- organising campaigns to raise public awareness,
- setting up a joint database for use by the agencies concerned.

The instruments – national strategies and action plan

In 2003, to help mitigate the increasing risk of IPR violations and their effects, and also in response to criticisms, the Romanian Government launched a national IP strategy to protect and enforce IPRs more effectively. This strategy sets out to promote co-operation between IPR agencies, reduce violations with the help of tougher border controls, and introduce stricter monitoring of respect for IPRs. This reflects Romania's growing determination to combat counterfeiting and piracy, but setting up effective machinery for enforcement and monitoring of IPRs still demands considerable efforts. A plan incorporating the strategy's main points was adopted by the Government on 29 September 2005⁵⁰. Its implementation is being monitored by a specialised agency within the Prosecution Service and Ministry of Justice, and by the European Commission.

The judicial system

Mr Codescu, Secretary of State for Justice, makes the point that the Ministry of Justice has no executive power to punish IPR violations. Since it is important that the various institutions should work more closely together, it is thus pursuing an active policy of facilitating co-operation between a) the authorities responsible for IPR enforcement, and b) those authorities and the private sector. The Ministry of Justice also helps the Prosecution Service to monitor the action plan.

The Attorney General's Office, which is an integral part of the Prosecution Service, was recently given the vital task of ensuring that IPRs are respected and co-ordinating the activities of the various agencies active in this area. Under the Romanian Constitution, the Prosecution Service operates under the authority of the Ministry of Justice. It should be noted, however, that the Ministry does not reserve the right to decide disputes, and plays a merely co-ordinating role. It does this through an IP law department, staffed by ten specialised prosecutors, which – since it centralises the data needed to enforce IPRs – is the chief co-ordinator of the other agencies. Finally, all IP cases are dealt with by first-instance courts.

⁴⁹ WIPO – Advisory Committee on Enforcement – Geneva, 15-16 May 2006 – Report by Mr Ion Codescu, Secretary of State, Ministry of Justice.

⁵⁰ Government decision No. 1174/2005 approving “the action plan for the period 2005/2007, covering joint measures to improve intellectual property rights”.

To form an accurate picture of the administrative capacity of these various bodies to enforce IPRs, it is important to note that the Romanian judicial system is at present the subject of thorough reform. The main aims of this reform are to give the courts adequate resources, standardise case-law, reduce the length of proceedings and the courts' case-load, appoint specialised judges and use modern management methods to make the giving of justice efficient.

Legislation

Romanian IP law is modelled on EU and other international standards. Thus, Emergency Government Order No. 190 of 2005 contains provisions to facilitate prosecution of IPR violators. Two of them merit special attention. Firstly, IPR violations lead to automatic prosecution and, as criminal offences, are not open to friendly settlement, and, secondly, IPR violations linked with organised crime are investigated by a special department established in the prosecutor's office at the Court of Cassation.

Similarly, Act No. 344/2005 on the implementation of certain measures to protect IPRs in customs proceedings has given the customs authorities increased powers to seize goods which are presumed to be counterfeit and/or pirated. Finally, Act No. 337/2005, amending Act No. 16/1995 on the legal protection of topographies of semi-conductors, transposes Directive 87/54 of the Council of the European Union of 16 December 1986.

In addition to these laws, two emergency government orders supplement this punitive arsenal: No. 123/2005, which amends and supplements Act No. 8/1996, and No. 25/2006, which strengthens the administrative powers of the ORDA (Romanian Patent Office).⁵¹

Medium-term government action

Gabriel Turcu, President of the Romanian Anti-Counterfeiting Association, recently declared that "approximately 30% of the products sold in Romania are counterfeit"⁵². Nonetheless, Romania has made steady progress in recent years on compliance with international IPR protection standards. This progress has accelerated dramatically in the last two years, which have seen the authorities, not only modernise the law, but also strengthen those measures which are hardest to implement. Obviously, much remains to be done, e.g. to strengthen co-operation with the private sector on the basis of renewed mutual trust, or to make the public more aware of the seriousness of the medium and long-term effects of counterfeiting and piracy.

France

Action against counterfeiting and digital piracy is one of the French Government's priorities. The eleven-point action plan launched in 2004 is already producing results: increased customs checks led to a sharp increase in the number of counterfeit articles seized in 2004 and 2005 (up by 61.4%). The Directorate General of Competition, Consumer Affairs and Anti-Fraud Measures (DGCCRF), is also involved in strengthening state action and has markedly increased its inspections (161 contentious proceedings in 2005, as compared with 121 in 2004 and 54 in 2003).

Among the measures taken, transposition of Directive (EC) No. 2004/48 is nearing completion. This will make the law more specific on a number of important points, e.g. the communication and preservation of evidence, the right to information on the origin of goods or service networks which violate IPRs, and on measures ordered by courts. Compensation for the damage caused by counterfeiting will also be increased to reflect the loss of earnings suffered by victims and the unfair profits made by counterfeiters.

⁵¹ Among other things, this order provides for transposition of EC Directive 2004/48, for abolition of the limitation on payment of cable and transmission royalties, and for strict division of supervisory powers between the ORDA and the police.

⁵² Source: *Cotidianul*, 12 October 2006.

The Counterfeiting Bill, which is an integral part of the Government's action plan, also makes changes in the Customs Code, bringing it into line with Regulation No. 1383/2003, which came into force on 1 July 2004. Specifically, it gives the customs services increased powers to impound goods suspected of violating IPRs. It also increases the DGCCRF's powers concerning the counterfeiting of trademarks, extends the TRACFIN (money laundering) unit's brief to counterfeiting, and provides for the exchange of information between police and inspecting authorities in counterfeiting cases.

France has not limited itself to legislation, however. The networking of IP experts in embassies, increased bilateral co-operation (Italy, Russia, Morocco), a policy for technical prevention and persuasion, and a national information campaign to bring the consequences of counterfeiting home to the public are also key elements in the action plan.

France may seem to be making headway in its efforts to combat counterfeiting but it is still too isolated from its neighbours. Moreover, the courts still make inadequate use of their punitive arsenal. In fact, the regulations which protect rights-holders and punish counterfeiters may well remain a dead letter until French courts enforce the laws fully. In this respect, however, they are no different from their counterparts in other European countries:⁵³ IP offences, like economic crimes, very rarely lead to firm convictions. And, when they do, the penalties are less than they are for offences against persons. In most such cases, indeed, the convicted offender gets off with a suspended sentence and a fine.

On this same question, Christine Lai⁵⁴, Director General of UNIFAB⁵⁵, confirms the Laffineur report's comments and gives reasons for them: "The latest case-law shows that merely procedural issues are starting to take over. In fact, the introduction of heavier penalties for counterfeiting has focused the debate on the production and processing of evidence. This protracts the proceedings, giving counterfeiters time to vanish and regroup, and nullifying the investigations carried out by right-holders and supervisory authorities. This is a considerable waste of time and money".

Moreover, IPRs are increasingly being contested, while ever more "perfect" copies are forcing right-holders to give more away, at the risk of violating fundamental principles of industrial secrecy. This is a spiral which endangers firms, and from which only counterfeiters benefit.

In France, the difficulty of bringing counterfeiters to justice is compounded by the fact that two-thirds of the goods intercepted and detained by customs are simply passing through. Since both senders and recipients are in other countries, the courts have to rely on international requests for the taking of evidence on commission, which is immensely time-consuming, and automatically restricts punitive action. Counterfeiters are skilled in exploiting this situation, in which the frontiers which still exist between judicial and police services in different countries favour transfrontier crime. Thus, François Mongin⁵⁶ reports, criminal organisations plan their operations with reference to national laws, trying to ensure that they produce, transport and distribute in the countries which have the most lenient criminal laws and practices.

Thus, although it may seem exemplary, the French system is too isolated internationally. Moreover, the Government's proactive stance is frequently at odds with the situation on the ground. The sheer scale of the task seems to defeat many public and semi-public agencies, and most of the professional associations which represent right-holders are sitting back and waiting for the Government's eleven-point plan to take effect. In spite of all the talk and promises, right-holders will only begin to take effective action against counterfeiting when a muscular, harmonised international policy, which is tailored to their interests, encourages them to apply the laws based on the Directives.

⁵³ Information report registered at the Office of the President of the National Assembly on 8 June 2005. Report on EU action against counterfeiting, submitted by Marc Laffineur MP, on behalf of the National Assembly's Delegation for the European Union.

⁵⁴ Magistrate, Attorney General's Deputy in the Paris Appeal Court.

⁵⁵ Union des Fabricants, the first French anti-counterfeiting body. This association represents all sectors of industry, with over 450 firms and 50 professional federations.

⁵⁶ Director General of Customs and Indirect Taxation in the Ministry of Economics, Finance and Industry.

Italy

Creative and industrial vitality, and well-known brand names, make Italy, like France, particularly vulnerable to counterfeiting – although it is also Europe's leading producer of fake goods and, some people suggest, the world's third after China and Korea. The harmful effects of massive counterfeiting in Italy are not just economic, but political too. According to the National Assembly's Delegation for the European Union, "This makes it hard for Europe to talk convincingly about determined action against counterfeiting to non-European authorities, who can simply retort that it needs to solve its own Italian problem before it starts lecturing others".⁵⁷

Faced with this massive problem, Italy is starting to take action on all fronts. The public authorities, with the special support of INDICAM⁵⁸, an association founded to combat counterfeiting, and the Italian Patents and Trademarks Office⁵⁹, are now taking vigorous action against manufacturers and distributors of counterfeit goods. At the same time, Italy is following the French example and running public information campaigns in the press and other media.

Thus, with the Government's approval, the Patents and Trademarks Office has launched a large-scale information campaign of major strategic importance. The aim is to convince the public that stealing an idea, trademark, design or patent is as serious as stealing an object. Unlike France, which insists on financial risks, and on dangers to safety and health, the Italian campaign focuses on the values inherent in the concept of industrial property, and particularly respect for other people's ideas. Teaching people what is lawful and unlawful is the aim of the second campaign which the Office has launched in schools, with the help of leaflets for schoolchildren and students and a competition.

Fighting counterfeiting is, first and foremost, a matter of strengthening the punitive arsenal, particularly via the new IP Code, which came into force on 19 March 2005. Especially noteworthy are its highly innovative measures to facilitate the destruction of seized goods, and increased deterrence based on criteria for the calculation of damages.

Bilateral agreements also allow signatories to join forces powerfully against counterfeiters. France and Italy have had a bilateral anti-counterfeiting committee since 2002, and this is getting encouraging results in terms of customs action and improved practices in the IP field. These alliances, like that recently concluded with China, hold one of the keys to progress on IP protection.

In terms of police action, the Government is taking resolute action to strengthen ties between customs/public authorities via public and private databases, the aim being to intensify useful exchange and act effectively on the ground. The successful inspections carried out between Modane and Ventimiglia are a perfect example of this co-ordinated approach.

Italy's appointment of a High Commissioner for Action against Counterfeiting should also be emphasised. One of his tasks is to co-ordinate the establishment, in the 19 offices of the "Istituto Nazionale per il Commercio Estero" of units specialising in IPR protection and action against counterfeiting: these will provide help for firms and monitor counterfeiting trends on strategic markets.

More particularly, they will also have the task of:

- monitoring markets to collect evidence of counterfeiting,
- providing information on IPR protection in various countries,
- providing advice and assistance for registration of all areas covered by IP law,

⁵⁷ Information report registered at the Office of the President of the National Assembly on 8 June 2005. Report on EU action against counterfeiting, submitted by Marc Laffineur, MP, on behalf of the National Assembly's Delegation for the European Union.

⁵⁸ Istituto di centromarca per la lotta alla contrefazione, an association directed by Carlo Guglielmi, President, and Silvio Paschi, Secretary General.

⁵⁹ The Italian Patents and Trademarks Office is directed by Maria Ludovica Agro.

- providing legal assistance to help firms to deal with violations of industrial property rights.

All of these moves are encouraging. However, “zero tolerance”, the aim proclaimed by the Italian Ambassador⁶⁰, will remain a pious wish until judicial action becomes more consistent and proactive. In many cases, judicial proceedings are initiated months, if not years, after the police have acted – and can then drag on for two to three years. These shortcomings are patent violations of the general obligation laid down in Article 3 of Directive No. 2004/48 of 29 April 2004.

Belgium

In 2003, the Belgian Government – realising that action was vitally needed on the disastrous consequences of counterfeiting and piracy - passed a bill on civil-law procedures in such cases. The adoption of Directive (EC) 2004/48 on the enforcement of intellectual property rights in April 2004 prompted certain amendments, but the substance of the bill remained unchanged.

The first part of the text introduces more effective penalties for IPR violations when these are accompanied by unfair competitive practices. Previously, it was not possible, in Belgian law, to prosecute simultaneously for counterfeiting and unfair competition. Since trading in copied or pirated goods generally involves unfair competition as well, there is no reason why the proceedings should not be joined. The bill also proposes centralising IPR disputes in Belgium. The idea is to have a team of judges specialising in IP cases, and so make Belgian judgments more consistent. Moreover, the bill deals with a number of questions already covered by the Directive, e.g. measures for preserving evidence (article 7), the right of information (article 8), corrective measures (article 10) and damages (article 13).

One issue covered in both the Directive and the bill is the preservation of evidence and the seizure of pirated or copied goods. Article 7 of the Directive is actually modelled on measures which have proved effective in several EU states⁶¹, and Belgium has itself had regulations on the seizure of counterfeit goods for some time. The text has benefited right-holders who want to produce evidence of IPR violations. According to Marc Verwilghen⁶², however, practice has revealed some technical flaws, which the bill sets out to remedy. So far, for example, trademark-holders have been unable to use the procedure for seizure of counterfeit goods available to other right-holders. Under the Directive, all right-holders can use it.

As well as adjusting its civil procedure, Belgium is working on a bill to harmonise its law on customs and excise with its law on customs. This text introduces criminal sanctions for serious breaches of IP legislation. In future, all IPR violations committed with fraudulent or malicious intent will expose the offender to criminal sanctions. Moreover, a complaint will no longer have to be lodged before action can be taken on violations. Finally, again according to the Belgian Minister of Economics, Energy, External Trade and Scientific Policy, “The introduction of far stiffer penalties and sanctions for the most unscrupulous offenders will increase the deterrent effect”.

National disparities in EU member states

Implementation of the Customs Regulation

Member states fall into three groups:

- countries where counterfeiting is a customs offence,
- countries where counterfeiting is not a customs offence
- countries where customs authorities may not act outside the Community Regulation.

⁶⁰ Interview with Marc Laffineur, French MP, referred to in the information report tabled on 8 June 2005 by the National Assembly’s Delegation for the European Union.

⁶¹ Such as the Anton Piller Order and the Doorstep Order in Great Britain, and seizure of counterfeit goods in France.

⁶² Belgian Minister of Economics, Energy, External Trade and Scientific Policy.

*There are few countries where counterfeiting is a customs offence. **Germany** is the first. When faced with goods suspected of being counterfeit, the customs authority may order their immediate removal and destruction, if the person responsible for them takes no action to prevent this, and the right-holder does not withdraw his application to have them seized at the border. The **Netherlands** is the second. Counterfeiting is a customs offence, but the Netherlands customs do not implement this system as effectively as their French counterparts. In fact, they concentrate on inspections in the strict sense, relying on risk analysis and playing no part in investigations.*

*In **Italy, Austria, the Czech Republic, Slovakia and Hungary** counterfeiting is not a customs offence. **Italy** does not go beyond the Community Regulation. **Austria** takes action on outside goods only, and the scope of such action is restricted to Article 1 of Community Regulation No. 1383/2003. However, Act No. 56/2004 supplements these arrangements by providing that customs officers may, if inspection shows that goods are counterfeit, take action under Community law. Under the Act, offences recorded under the Community Regulation are not customs offences, but are treated as financial fraud, punishable by a small fine. **The Czech Republic** and **Slovakia** base themselves on the Community Regulation, but have judicial power to seize counterfeit goods throughout their territory. **Hungary** also exercises national administrative and judicial powers throughout its territory regardless of the status of goods (markets, shops).*

*Countries where the customs authorities may not act outside the Community Regulation include **Denmark, Spain** (also **Andorra**), **Lithuania, Portugal, Poland** and **Slovenia**, where the customs authorities may act only under the Community Regulation. Customs authorities in **Estonia** and **Latvia** also have no powers, and counterfeiting is solely a criminal offence.*

Disparities in criminal sanctions

*In **Italy**, the Criminal Code (Articles 473 and 474) makes manufacturing or importing counterfeit goods an offence. Although the penalty for this is three years' imprisonment and a fine of € 2,065, the Code does not permit detention on remand or even police custody. Article 474 also makes trading in counterfeit goods an offence, but this punitive arsenal falls a long way short of the penalties applied, for example, in France.*

*In **Greece**, the penalties for counterfeiting provided for in Section 66 of Act 2121/93 of 4 March 1993 include a one-year prison sentence and fines of 2,900 to 15,000 euros. Severer penalties may be imposed if the profits derived from the offence are very substantial.*

*In **Germany**, when an offence against industrial and commercial property has patently been committed, the goods are impounded, and the dispute is settled under the national law of the place concerned. The law on protection of trademarks provides for a fine and a prison sentence of up to five years.*

***Spain** tightened up its regulations in 2004: penalties for offences against intellectual and industrial property may extend to four years' imprisonment and daily fines indexed on the cost of living for a maximum of 24 months.*

*In **Portugal**, Articles 321 to 328 of the Code of Industrial Property punish counterfeiting by a prison sentence of up to 3 years and a fine of 360 or 120 days, depending on the case.*

*Under the **Netherlands** Criminal Code, "personal use" counterfeiting is not an offence. In principle, no one may be prosecuted for possessing a few articles, spare parts or trademarks which have been copied for personal use only.*

*In **Poland**, the courts may impose fines or prison sentences or order confiscation of goods. Their discretionary margin is very flexible, since the Criminal and Criminal Taxation Codes specify no thresholds. However, the great majority of the member states essentially deal with counterfeiting under civil law. This is the case in the Netherlands, Luxembourg and Italy, with the latter supplementing criminal proceedings by adding civil law penalties for unfair competition. Similarly, Austria regards counterfeiting*

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as a private business matter. In Denmark, the law does not provide for damages, and firms which bring civil proceedings for imitation of their products stand little chance of being awarded damages higher than, or even equal to, the outlay saved by unlawful copying.

Reporting committee: Committee on Economic Affairs and Development

Reference to committee: Doc. 10946; Reference 3250 of 30 June 2006

Draft recommendation adopted by the Committee on Economic Affairs and Development on 26 March 2007

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N.B: The names of the members who took part in the meeting are printed in **bold**

Head of Secretariat: Mr Newman

Secretaries to the committee: Ms Ramanauskaitė and Mr de Buyer