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**LIMITE**

**DROIPEN 40**

**NOTE**

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from :	Presidency
to :	Working Party on Substantive Criminal Law
No. prev. doc. :	13103/07 DROIPEN 59 PI 48 CODEC 958
No. Cion prop. :	8866/06 DROIPEN 31 PI 27 CODEC 405 COM(2006) 168 final
Subject :	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

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**I. INTRODUCTION**

On 2 May 2006 the Commission submitted an 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. The amended proposal for a Directive replaces the earlier Commission proposals for a Directive and a Framework Decision (COM(2005) 276 final). The provisions of the earlier proposals have been incorporated into the amended proposal<sup>1</sup>. The legal basis given for the amended Commission proposal is Article 95 TEC (the establishment and functioning of the internal market).

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<sup>1</sup> The only material provisions that have not been included in the amended proposal are those relating to jurisdiction and the coordination of proceedings. The Commission has issued a Green Paper on conflicts of jurisdiction and the principle of ne bis in idem in criminal proceedings, adopted on 23 December 2005, COM(2005) 696 final.

By judgment of 13 September 2005, the European Court of Justice annulled Framework Decision 2003/80/JHA on the protection of the environment through criminal law (C-176/03 Commission v. Council). The Court decided that as a general rule, neither criminal law nor the rules of criminal procedure fell within the Community's competence; however, this finding did not prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities was an essential measure for combating serious environmental offences, from taking measures which related to the criminal law of the Member States which it considered necessary in order to ensure that the rules which it laid down on environmental protection were fully effective. On this basis, the Court ruled that the Framework Decision encroached on Community competence, and did not respect Article 47 TEU.

The Commission submitted a Communication to the Council and the Parliament on the consequences of the Court's judgment (COM(2005) 583 final). The amended proposal of 2 May 2006 referred to above, for a Directive on criminal law measures aimed at ensuring the enforcement of intellectual property rights, was issued in line with this Communication.

The Council of Justice and Home Affairs Ministers considered the matter on 6 October 2006, on the basis of 13013/06 DROIPEN 59 PI 48 CODEC 958.

The Council discussed the issues set out in document 13103/06 and came to the following conclusions (see Council minutes (13605/06 PV/CONS 54 JAI 493, COR 1 REV 1) adopted by Coreper on 21 February 2007 under agenda item 2a):

- "Bearing in mind the principle of subsidiarity, further scrutiny is needed with regard to the need of criminal measures at EU level to protect intellectual property rights.
- **The Presidency<sup>2</sup> will discuss with the incoming Presidency<sup>3</sup> the possible ways of handling the substantive provisions of the instrument** while awaiting the evaluation of Directive 2004/48/EC and the ruling of the Court of Justice in case C-440/05 which would give guidance on the question of Community competence in adopting criminal law measures.

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<sup>2</sup> Finnish Presidency.

<sup>3</sup> German Presidency.

- The discussions on the substantive provisions of the instrument should be based on a scope of the instrument limited to the intellectual property rights harmonised in Community legislation, in line also with the principles included in the conclusions of the informal meeting in Vienna on 13/14 January 2006."

## II. State of play in the European Parliament

On 25 April 2007 the European Parliament (EP) passed a legislative resolution on the Commission proposal (P 6\_TA-PROV (2007)0145), adopting the proposal subject to a large number of amendments.

The amendments relate, inter alia, to the following recitals and provisions:

1. Punishable offences to be restricted to piracy and counterfeiting, where committed on a commercial scale (1st recital, first paragraph of Article 1);
2. Scope of the Directive to be restricted to the infringement of intellectual property rights harmonised in Community legislation, i.e. excluding patent rights, utility models and plant variety rights (5th recital, 2nd and 4th paragraphs of Article 1);
3. Definition of the term "intentional infringements of an intellectual property right" to mean "any deliberate and conscious infringement of the right concerned for the purpose of obtaining an economic advantage on a commercial scale" (Article 2(c));
4. Reference to Article 3(5) of the Directive on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing to define "serious" (Articles 5(1) and 6);
5. Restriction on the involvement of injured holders of property rights in joint investigation teams (10th recital, Article 9(2) and (3));
6. Definition of "infringements on a commercial scale" to mean "any infringement of an intellectual property right committed to obtain a commercial advantage" (Article 2(b), first clause).

7. Removal of the requirement that attempt should be punishable (first paragraph of Article 3).

In addition, the European Parliament came out in favour of a series of amendments relating to the Commission's proposed penalties for the infringement of intellectual property rights.

### **III. Questions outstanding**

**Under these circumstances, the Presidency feels that the following issues need to be addressed:**

- Legal basis for laying down rules on criminal law (to be deferred initially in the light of the above decision of the Justice and Home Affairs Ministers);
- Scope of the Directive (confined to the infringement of intellectual property rights harmonised in Community legislation, or more far-reaching);
- Definition of offences (e.g.: counterfeiting, piracy);
- Qualitative limitations on offences (e.g.: on a commercial scale, serious crimes);
- Participation (incitement/aiding and abetting);
- Whether attempt should be a criminal offence;
- Penalties for natural persons;
- Liability of legal persons and penalties for legal persons;
- Confiscation and forfeiture; extended powers of confiscation;
- Joint investigation teams and involvement of right holders;
- Further amendments tabled by the European Parliament.

### **IV. Further action**

The Presidency would like to use the meeting of the Working Party on Substantive Criminal Law on 4 June 2007 to discuss the amendments tabled by the European Parliament. Accordingly, it plans to start with a general exchange of views and then begin to examine the European Parliament position in detail.

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